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## A Purchaser for Resale Is a Consumer Protected by DTPA.

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**TRADE REGULATION—DECEPTIVE TRADE PRACTICES—  
CONSUMER PROTECTION ACT—A Purchaser for Resale  
is a Consumer Protected by DTPA**

*Big H Auto Auction v. Saenz Motors*,  
665 S.W.2d 756 (Tex. 1984).

In 1978, Saenz Motors purchased two automobiles for resale from Big H Auto Auction.<sup>1</sup> Big H furnished Saenz Motors with certified copies of the Texas certificates of title, explaining the substitution was due to the loss of the originals.<sup>2</sup> When the purchasers from Saenz Motors were informed by the Department of Public Safety that the two automobiles were stolen vehicles, Saenz Motors requested the return of the purchase price from Big H.<sup>3</sup> Upon Big H's refusal, Saenz Motors brought suit under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA).<sup>4</sup> The trial court held that Saenz Motors was not a consumer because the automobiles were "purchased for resale," and, therefore, the court denied Saenz Motors DTPA protection.<sup>5</sup> The Texas Court of Appeals for the Thirteenth Supreme Judicial District at Corpus Christi reversed in part, concluding that Saenz Motors was a "consumer" and could recover under the DTPA.<sup>6</sup> Big H filed an application for writ of error to the Texas Supreme Court.<sup>7</sup> Held—*Affirmed*. A purchaser for resale is a "consumer" because the resale

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1. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 756 (Tex. 1984). Big H is an automobile auctioneer, and Saenz Motors is a used car dealer. See *Saenz Motors v. Big H Auto Auction*, 653 S.W.2d 521, 522 (Tex. App.—Corpus Christi 1983), *aff'd*, 665 S.W.2d 756 (Tex. 1984).

2. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 756 (Tex. 1984).

3. See *id.* at 756. This demand was made subsequent to a hearing held to determine ownership. See *Saenz Motors v. Big H Auto Auction*, 653 S.W.2d 521, 524 (Tex. App.—Corpus Christi 1983), *aff'd*, 665 S.W.2d 756 (Tex. 1984).

4. See *Saenz Motors v. Big H Auto Auction*, 653 S.W.2d 521, 522 (Tex. App.—Corpus Christi 1983) (action brought for breach of implied warranty of title pursuant to TEX. BUS. & COM. CODE ANN. § 2.312 (Tex. UCC) (Vernon 1968) and *id.* § 17.50(a)(2) (Vernon Supp. 1984)), *aff'd*, 665 S.W.2d 756 (Tex. 1984).

5. See *id.* at 524.

6. See *id.* at 525. The decision was based on the intended public policy of the legislature "to protect the innocent purchaser, and not to shield the seller from an action to recover for breach of an implied warranty of title." See *id.* at 525.

7. See *Big H Auto Auction v. Saenz Motors*, 26 Tex. Sup. Ct. J. 499, 501 (July 7, 1983). The application was granted by the court on Oct. 5, 1983. See *Big H Auto Auction v. Saenz Motors*, 27 Tex. Sup. Ct. J. 1, 2 (Oct. 8, 1983).

of goods is a "use" within the DTPA's definition of "goods."<sup>8</sup>

In 1906, the promulgation of the Uniform Sales Act by the National Conference of Commissioners on Uniform State Laws triggered the first state statutory enactments having an impact upon consumer protection.<sup>9</sup> More recently, increased awareness of the need for better consumer protection has resulted in the inclusion of consumer oriented provisions throughout the Uniform Commercial Code,<sup>10</sup> the Federal Trade Commission Act,<sup>11</sup> and the Magnusson-Moss Warranty Act,<sup>12</sup> in addition to local con-

8. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 758-59 (Tex. 1984) (cause of action arose under 1977 version of DTPA; still applicable under present law).

9. See UNIF. SALES ACT § 15, 1 U.L.A. 213 (act withdrawn 1966). The Uniform Sales Act was adopted by approximately two-thirds of the jurisdictions. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 2-3 (2d ed. 1980). This statutory protection was essentially a codification of existing common law and a copy of the English Sales of Goods Act. See R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 1.12, at 44 & n.2 (1951) (§ 15(1), (2) contained the warranties of fitness and merchantability). Under the English Sales of Goods Act the consumer was allowed to avail himself of "implied warranties in sales transactions." See Comment, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 UCLA L. REV. 401, 408 & n.24 (1974) (citing English Sales of Goods Act of 1894). Prior to this act, the common law implied warranties did not cover consumer retail transactions, but were only extended to wholesale dealers because their transactions were mostly conducted over long distances. See *id.* at 407. Nevertheless, it appears that before the adoption of the English Sales of Goods Act consumers were protected by an implied warranty in transactions involving retail of food for immediate consumption. See R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 1.1, at 19 (1951).

10. U.C.C. § 1-101 (1978). The Uniform Commercial Code, a revision of the Uniform Sales Act, has been enacted with minor variations in the District of Columbia and all states except Louisiana. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 1 (2d ed. 1980). In regard to consumer oriented provisions within the Texas version of the UCC, a purchaser can be a consumer "if he purchases goods primarily for personal, family or household purposes." See TEX. BUS. & COM. CODE ANN. § 9.109(1) (Tex. UCC) (Vernon Supp. 1984). Sections 2.312 through 2.318 provide for express as well as implied warranties of title, of merchantability, and of fitness for a particular purpose arising out of usage of trade and against infringement by the buyer. See *id.* §§ 2.312-.318 (Tex. UCC) (Vernon 1968). The UCC is of further importance to the consumer because every obligation or transaction under article 2 entails a good faith requirement in the performance and enforcement of a contract. See TEX. BUS. & COM. CODE ANN. § 1.203 (Tex. UCC) (Vernon 1968); see also Cohan, *The Rights and Duties of Retail Merchants Under State Consumer Protection Laws: Emergent Doctrines and Strategies of the Defense*, 18 NEW ENG. L. REV. 297, 305 (1982-1983). The good faith requirement for a merchant is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." See TEX. BUS. & COM. CODE ANN. § 2.103(a)(2) (Tex. UCC) (Vernon 1968). *Salois v. Mutual of Omaha Ins. Co.*, 581 P.2d 1349, 1351 (Wash. 1978) held that a merchant's breach of his duty of good faith and fair dealing constitutes an unfair and deceptive practice. See Cohan, *The Rights and Duties of Retail Merchants Under State Consumer Protection Laws: Emergent Doctrines and Strategies of the Defense*, 18 NEW ENG. L. REV. 297, 305 & n.62 (1982-1983).

11. 15 U.S.C. §§ 41-77 (1982). No private right of action is provided by the Federal

sumer protection acts.<sup>13</sup> Texas attempted to satisfy this need with the 1967 enactment of the Texas Interest—Consumer Credit and Consumer Protection Act,<sup>14</sup> the immediate precursor of the DTPA.<sup>15</sup> Under the Texas Interest—Consumer Credit and Consumer Protection Act, consumer protection was precarious because it failed to provide for a private cause of

Trade Commission (FTC) Act; therefore, the Act is “of limited utility in determining whether the consumer is entitled to damages.” See Cohan, *The Rights and Duties of Retail Merchants Under State Consumer Protection Laws: Emergent Doctrines and Strategies of the Defense*, 18 NEW ENG. L. REV. 297, 302 (1982-1983). Under the Act, the FTC has the duty to regulate “the advertising and sale of goods and services” in order to protect the consumer. See *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 685 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). The FTC can promulgate interpretative rules as well as general statements of policy regarding unfair and deceptive acts and practices. See 15 U.S.C. § 57a (1982). These interpretative rules have the effect of substantive law. See *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

12. Magnusson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, 15 U.S.C. §§ 2301-2312 (1982). The goal of this act is to facilitate “private enforcement of warranty rights by consumers . . . .” See Miller & Kanter, *Litigation Under Magnusson-Moss: New Opportunities in Private Actions*, 13 U.C.C. L.J. 10 (1980). “Consumer” under the Act includes anyone who “buys a consumer product for purposes other than resale.” See 15 U.S.C. § 2301(3) (1982).

13. See Cohan, *The Rights and Duties of Retail Merchants Under State Consumer Protection Laws: Emergent Doctrines and Strategies of the Defense*, 18 NEW ENG. L. REV. 297, 298 n.2 (1982-1983) (Texas Deceptive Trade Practices-Consumer Protection Act, New York Consumer Protection Act, Oregon Unlawful Trade Practices Act).

14. Interest—Consumer Credit and Consumer Protection Act, ch. 274, §§ 1-9, 1967 Tex. Gen. Laws, Gen. & Spec. 608, 608-60, *amended by* Act of June 10, 1969, ch. 452, §§ 1-3, 1969 Tex. Gen. Laws, Gen. & Spec. 1504, 1504-09.

15. See *id.* § 2, 1967 Tex. Gen. Laws, Gen. & Spec. at 608-09, *amended by* Deceptive Trade Practices-Consumer Protection Act, ch. 143, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 322, 322-43 (current version at TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon Supp. 1984)). In its declaration of legislative intent, the legislature made the following findings of fact:

(1) Many citizens of our State are being victimized and abused in various types of credit and cash transactions. These practices impose a great hardship upon the people of our State.

(2) Credit in its various forms is one of the most essential and vital elements of our economy. It can be truly said that credit affects every citizen every day. Credit transactions in our State amount to many billions of dollars per year.

(3) Credit abuses now existing in our State stem from the fact that many types of credit transactions are now subject to effective public regulation and control and the penalties imposed for usury do not provide effective or workable safeguards in this vital area of economic activity.

(4) Such abuses are especially prevalent in the area of consumer transactions both cash and credit. Unscrupulous operators, lenders and vendors, many of whom are transient to our State, are presently engaged in many abusive and deceptive practices in the conduct of their businesses. These unregulated practices bring great social and economic hardship to many citizens of our State. They impose intolerable burdens on

action to a commercially injured consumer.<sup>16</sup> In order to seek relief for his injuries resulting from deceptive acts or practices, the consumer had to avail himself of the common law action of fraud,<sup>17</sup> which involves a complex burden of proof and the numerous defenses which pervade all common law actions.<sup>18</sup> These inadequacies in consumer protection were

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those segments of our society which can least afford to bear them—the uneducated, the unsophisticated, the poor and the elderly.

(5) These facts conclusively indicate a need for a comprehensive code of legislation to clearly define interest and usury, to classify and regulate loans and lenders, to regulate credit sales and services, and place limitations on charges imposed in connection with such sales and services, to provide for consumer education and debt counseling, to prohibit deceptive trade practices in all types of consumer transactions, and to provide firm and effective penalties for usury and other prohibited practices.

(6) It is the intent of the Legislature in enacting this revision of Title 79 of the Revised Civil Statutes of Texas, 1925, to protect the citizens of Texas from abusive and deceptive practices now being perpetrated by unscrupulous operators, lenders and vendors in both cash and credit consumer transactions and to implement the mandate of Section II of Article XVI of the Constitution of Texas which authorizes the Legislature to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest, and thus serve the public interest of the people of this State.

*Id.* at 608-09.

16. *See* *Woo v. Great Sw. Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (DTPA resulted from legislature's recognition of inadequacies of common law remedies); *see also* *McCarthy, An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?*, 11 ST. MARY'S L.J. 885, 890 (1980). Private consumers could not avail themselves of any injunctive relief; however, upon demand of the Consumer Credit Commissioner, the Attorney General could enjoin persons engaging in unfair trade practices from continuing those practices when they were violating the DTPA's "laundry list." *See id.* at 888. In 1969, this procedure was modified "to allow the Attorney General to independently seek injunctions against sellers engaging in deceptive practices." *See id.* at 889. *Compare* Interest—Consumer Credit and Consumer Protection Act, ch. 274, sec. 2, art. 10.04, 1967 Tex. Gen. Laws, Gen. & Spec. 608, 658-59 (Consumer Credit Commissioner can request Attorney General to bring action against persons engaging or about to engage in deceptive practices) (amended 1969) (current version at TEX. BUS. & COM. CODE ANN. § 17.47 (Vernon Supp. 1984)) *with* Interest—Consumer Credit and Consumer Protection Act, ch. 452, sec. 1, art. 10.04b, 1969 Tex. Gen. Laws, Gen. & Spec. 1504, 1506 (Attorney General may, on his own initiative, bring action against persons engaging in, who have engaged in, or who are about to engage in deceptive practices) (amended 1973) (current version at TEX. BUS. & COM. CODE ANN. § 17.47 (Vernon Supp. 1984)).

17. *See* *McCarthy, An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?*, 11 ST. MARY'S L.J. 885, 890 n.30 (1980) (tort action of fraud was only remedy available to aggrieved consumer); *see also* *Curry, The 1979 Amendments To The Deceptive Trade Practices-Consumer Protection Act*, 32 BAYLOR L. REV. 51, 52 (1980) (victim of deceptive practice is limited to tort action of fraud or deceit).

18. *See* *McCall v. Trucks of Texas*, 535 S.W.2d 791, 794 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.). The court stated:

To establish fraud it must appear that (1) a material representation was made; (2) it was

alleviated by the 1973 enactment of the DTPA and its subsequent amendments.<sup>19</sup>

Under the DTPA, an aggrieved consumer can bring a “statutory cause of action imposing strict liability for false, misleading or deceptive acts or practices.”<sup>20</sup> Furthermore, by providing for the possible recovery of treble

false; (3) when the representation was made, the speaker knew it was false or that he made it recklessly without any knowledge of its truth and as a positive assertion; (4) the speaker made the representation with the intention that it should be acted upon by the party; (5) the party acted in reliance upon the representation, and (6) the party thereby suffered injury.

*Id.* at 794; *see also* Brady v. Johnson, 512 S.W.2d 359, 361 (Tex. Civ. App.—Austin 1974, no writ) (elements of proof necessary to establish fraud); Curry, *The 1979 Amendments To The Deceptive Trade Practices-Consumer Protection Act*, 32 BAYLOR L. REV. 51, 52 (1980) (legal and non-legal barriers to consumer protection); McCarthy, *An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?*, 11 ST. MARY'S L.J. 885, 890 n.30 (1980) (injured plaintiff carried heavy burden of proof at common law); Patton, *Case Law Under the Texas Deceptive Trade Practices-Consumer Protection Act*, 33 BAYLOR L. REV. 533, 533 (1981) (common law actions hampered by heavy burden of proof and many defenses).

19. *Compare* Custom Leasing, Inc. v. Texas Bank & Trust, 516 S.W.2d 138, 142-43 (Tex. 1974) (common law action of fraud requires proof seller's statement intended to be relied on by purchaser) *with* Spradling v. Williams, 566 S.W.2d 561, 564 (Tex. 1978) (no proof of intent to induce purchaser required under DTPA). *See also* Goodfriend & Lynn, *Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practices Act*, 33 SW. L.J. 941, 947-49 (1979). Some of the proscriptions prior to the 1979 amendments contained requirements of knowledge or scienter, where others required intent or fraud. *See id.* at 947. The injured consumer, since the 1979 amendment, now only has to show that the DTPA was “knowingly” violated by the defendant to recover treble damages, and he need not prove “scienter” to recover actual damages. *See id.* at 948. The DTPA, as originally enacted in 1973, has been subject to amendments in 1975, 1977, 1979, and 1983. *See* Deceptive Trade Practices-Consumer Protection Act, ch. 62, secs. 1, 2, §§ 17.45, .54, 1975 Tex. Gen. Laws, Gen. & Spec. 149, 149 (current version at TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1984)), *amended by* Act of May 23, 1977, ch. 216, §§ 1-14, 1977 Tex. Gen. Laws, Gen. & Spec. 600, 600-05 (amending §§ 17.45, .46(b), (c), .47(a)-(d), .50(a), .56, .59, adding §§ 17.50A, .55A, and repealing §§ 17.51-.54 of DTPA) (current version at TEX. BUS. & COM. CODE ANN. §§ 17.45-.59 (Vernon Supp. 1984)), *amended by* Act of June 13, 1979, ch. 603, §§ 1-10, 1979 Tex. Gen. Laws, Gen. & Spec. 1327, 1327-32 (amending §§ 17.43, .45, .46, .50, .50A, .50B, .56, and adding §§ 17.50B and .56A to DTPA) (current version at TEX. BUS. & COM. CODE ANN. §§ 17.43-.56A (Vernon Supp. 1984)), *amended by* TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1984).

20. *See* McCarthy, *An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?*, 11 ST. MARY'S L.J. 885, 891 (1980) (consumer can bring private cause of action for damages); *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1984) (aggrieved party must be consumer in order to bring private cause of action); Woo v. Great Sw. Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (consumer merely has to allege and prove factual causation of actual damages); Curry, *The 1979 Amendments To The Deceptive Trade Practices-Consumer Protection Act*, 32 BAYLOR L. REV. 51, 52 (1980) (remedy of fraud at common law replaced by statutory strict liability).

damages, court costs, and reasonable attorneys' fees,<sup>21</sup> this statutory scheme removes the economic barrier which hampered successful consumer protection prior to 1973.<sup>22</sup> It also serves as an effective deterrent to engaging in deceptive trade practices.<sup>23</sup> Despite its positive attributes, the DTPA has been subject to several amendments, which have consistently broadened its scope of protection.<sup>24</sup>

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21. See TEX. BUS. & COM. CODE ANN. § 17.50(b), (d) (Vernon Supp. 1984). It should be observed, however, that:

[t]here are restrictions to the recovery of treble damages. Upon a simple showing that an unlawful act occurred and that the act was a "producing cause" of actual damages, the court must award an amount of damages consisting of actual damages plus twice that portion of the actual damages that does not exceed \$1,000. The trier of fact may award not more than three times the amount of actual damages in excess of \$1,000, but only if it finds that the defendant "knowingly" committed an actionable violation of the Act.

18 TEX. INT'L L.J. 369, 369 n.4 (1983) (quoting in part TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1984)) (citations omitted). In contrast, under art. 2 of the Texas Uniform Commercial Code, a buyer can recover actual damages in a case of breach of warranty, which are the difference at the time of the acceptance between "the value of the goods and the value they would have had if they had been as warranted." See TEX. BUS. & COM. CODE ANN. § 2.714(2) (Tex. UCC) (Vernon 1968). Further, under § 2.715(1), the buyer can recover "incidental damages," which are expenses reasonably incurred and "incidental to the seller's breach." See *id.* § 2.715(1); see also J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 10-3, at 384 (2d ed. 1980). The code further provides that the buyer can recover "consequential damages" which include "(1) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (2) injury to person or property proximately resulting from any breach of warranty." See TEX. BUS. & COM. CODE ANN. § 2.715(2) (Tex. UCC) (Vernon 1968). Whether consequential damages will be awarded to the buyer depends on whether the damages were foreseeable to the seller. See *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903) (consequential damages must have reasonably been in contemplation of parties when making contract); see also J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 10-4, at 388-90 (2d ed. 1980).

22. See *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980) (additional damage recovery provides consumers with incentives to pursue their claims under DTPA); see also Curry, *The 1979 Amendments To The Deceptive Trade Practices-Consumer Protection Act*, 32 BAYLOR L. REV. 51, 52-53 (1980) (DTPA's provision for treble damages encourages litigation not likely initiated at common law).

23. See *Pennington v. Singleton*, 606 S.W.2d 682, 686 (Tex. 1980) (deterrence of violation of DTPA provided by additional liability over and above actual damages); see also McCarthy, *An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?*, 11 ST. MARY'S L.J. 885, 892 (1980) (possible recovery of treble damages deters unscrupulous vendors); Patton, *Case Law Under the Texas Deceptive Trade Practices-Consumer Protection Act*, 33 BAYLOR L. REV. 533, 533 (1981) (defendant and other sellers deterred from future violations).

24. See Deceptive Trade Practices-Consumer Protection Act, ch. 62, sec. 1, § 17.45(1), (4), 1975 Tex. Gen. Laws, Gen. & Spec. 149, 149 (extension of "goods" to include "real property" and "consumer" to include "partnerships and corporations") (current version at TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1984)), amended by Act of May 23,

This expansive trend caused the determination of who is protected under the Act to become one of the most litigated issues of the DTPA.<sup>25</sup> The class of potential plaintiffs is delineated by the DTPA's definitions of "consumer,"<sup>26</sup> "goods,"<sup>27</sup> and "services."<sup>28</sup> As defined in the enactment of 1973, "consumer" was limited to "an individual who seeks or acquires by

1977, ch. 216, secs. 1, 6, §§ 17.45(2), .45(5), .50A, 1977 Tex. Gen. Laws, Gen. & Spec. 600, 600-05 ("for other than commercial or business use" deleted from "services"; "merchant" deleted as exception to "consumer"; provision of certain defenses to treble damages) (current version at TEX. BUS. & COM. CODE ANN. §§ 17.41-.59 (Vernon Supp. 1984)), amended by Act of June 13, 1979, ch. 603, secs. 1-10, §§ 17.43, .46(a), .50B, 1979 Tex. Gen. Laws, Gen. & Spec. 1327, 1327-32 (elimination of private cause of action under omnibus clause; limitation on compounding of penalties; addition of duty to disclose) (current version at TEX. BUS. & COM. CODE ANN. §§ 17.43-.56A (Vernon Supp. 1984)), amended by TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1984) (exclusion of State of Texas or subdivision as business consumer; exclusion of business consumer with at least \$25 million in assets; inclusion of "commercial or business" in definition of business consumer).

25. See Patton, *Case Law Under the Texas Deceptive Trade Practices-Consumer Protection Act*, 33 BAYLOR L. REV. 533, 541 (1981).

26. See TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1984).

"Consumer" means 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, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.

*Id.* There is a two-prong test to determine whether a purchaser has consumer standing under the DTPA: (1) "the person 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." See *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981) (both requirements must be satisfied, otherwise only common law remedy available).

27. See TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon Supp. 1984). "'Goods' means tangible chattels or real property purchased or leased for use." *Id.* But see *id.* § 2.105 (Tex. UCC) (Vernon 1968) (definition of "goods" does not depend upon whether "goods" are purchased or leased for use, but instead requires they be existing and identified). Under art. 2 of the UCC, "goods" are "all things . . . which are movable at the time of identification to the contract for sale" except money, investment securities and things in action; specifically included are "unborn animals," "growing crops," and "identified attachments to real property." See *id.* § 2.105(a). An important distinction between the definitions of "goods" in the DTPA and in the UCC is that "real property" is excluded from the art. 2 definition. See *id.* § 2.105(a). An even greater distinction can be observed between the DTPA definition of "goods" and the UCC definition of "consumer goods." See *id.* § 9.109(1) (Tex. UCC) (Vernon Supp. 1984). "Consumer goods" are goods which are "used or bought for use primarily for personal, family or household purposes . . ." See *id.* § 9.109(1).

28. See *id.* § 17.45(2) (Vernon Supp. 1984). "'Services' means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." *Id.* § 17.45(2); see also *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 173-76 (Tex. 1980) (in applying for loan plaintiff did not seek either "goods or services," therefore, not "consumer" for DTPA purposes); Patton, *Case Law Under the Texas Deceptive Trade Practices-Consumer Protection Act*, 33 BAYLOR L. REV. 533, 545 (1981) (terms determine who can bring private cause of action).



purchase or lease, any goods or services.”<sup>29</sup> Even though the 1973 definition of “goods” did not expressly exclude “commercial or business use,”<sup>30</sup> it was, nevertheless, interpreted to exclude this type of use from protection under the DTPA due to the extension, by analogy, of the restrictive language in the definition of “services” to the definition of “goods.”<sup>31</sup> In 1977, the clause “for other than commercial and business use” was deleted from the definition of “services,”<sup>32</sup> so as to bring that definition in harmony with the definition of “goods.”<sup>33</sup> In addition, “consumers” were no longer limited to nonmerchants due to the deletion of “merchant” as an exception to “consumer.”<sup>34</sup>

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29. See Deceptive Trade Practices-Consumer Protection Act, ch. 143, § 17.45(4), 1973 Tex. Gen. Laws, Gen. & Spec. 322, 323 (amended 1975, 1977, 1979, 1983) (current version at TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1984)); see also D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.01, at 30 (1983) (comparison of “consumer” definitions under different amendments). The 1975 amendment added “partnership or corporation” to the definition of “consumer” and “real property” to that of “goods.” See Deceptive Trade Practices-Consumer Protection Act, ch. 62, sec. 1, § 17.45(1), (4), 1975 Tex. Gen. Laws, Gen. & Spec. 149, 149 (amended 1977) (current version at TEX. BUS. & COM. CODE ANN. § 17.45(1), (4) (Vernon Supp. 1984)); see also Perrin, *Standing to Sue and the Damage Provision: Two Controversial and Dynamic Concepts Under the DTPA*, 24 S. TEX. L.J. 207, 208 (1983) (1975 and 1977 amendments added partnerships, corporations and governmental entities to definition of consumer).

30. See Deceptive Trade Practices-Consumer Protection Act, ch. 143, sec. 1, § 17.45(1), 1973 Tex. Gen. Laws, Gen. & Spec. 322, 323 (amended 1975) (current version at TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon Supp. 1984)). “Goods” was defined as “tangible chattels bought for use.” *Id.*

31. See Deceptive Trade Practices-Consumer Protection Act, ch. 62, sec. 1, § 17.45(2), 1975 Tex. Gen. Laws, Gen. & Spec. 149, 149 (amended 1977) (current version at TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon Supp. 1984)). “Services” was defined as “work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods.” *Id.*

32. See Deceptive Trade Practices-Consumer Protection Act, ch. 216, sec. 1, § 17.45(2), 1977 Tex. Gen. Laws, Gen. & Spec. 600, 600-05 (current version at TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon Supp. 1984)). The 1977 version of the DTPA defines “services” as “work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.” *Id.*

33. See *Otto, Inc. v. Cotton Salvage & Sales*, 609 S.W.2d 590, 594 (Tex. Civ. App.—Corpus Christi 1980, writ dismissed) (1977 amendment intended to bring definition of “services” in harmony with definition of “goods”).

34. See Deceptive Trade Practices-Consumer Protection Act, ch. 143, sec. 1, § 17.45(5), 1973 Tex. Gen. Laws, Gen. & Spec. 322, 323 (repealed 1977). Section 17.45(5) of the DTPA, prior to the 1977 amendment, defined “merchant” as “a party to a consumer transaction other than a consumer.” *Id.* The 1977 amendment deleted the contents of § 17.45(5) and replaced it with the definition of “unconscionable action or course of action.” See TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon Supp. 1984); see also Goodfriend & Lynn, *Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practices Act*, 33 Sw. L.J. 941, 1004 (1979) (removal of definition of “merchant” from DTPA); Perrin, *Standing to Sue and the Damage Provision: Two Controversial and Dynamic*

Even though these consecutive amendments have broadened the scope of the DTPA, the legislature's failure to define "use"<sup>35</sup> has left partially unanswered the question of who is protected under the Act.<sup>36</sup> The different interpretations of the word "use"<sup>37</sup> have caused the Texas courts to be divided on the issue of DTPA protection for a "purchaser for resale."<sup>38</sup> The 1980 decision of the federal district court in *South Texas Irrigation Systems v. Lockwood Corp.*<sup>39</sup> exemplifies the holdings of those courts which have refused to find that a purchaser for resale is a "consumer" within the meaning of the DTPA.<sup>40</sup> In *South Texas Irrigation Systems*, the plaintiff, an authorized dealer of the defendant's irrigation systems, was denied recovery under the DTPA for the defendant's failure to pay its ad-

*Concepts Under the DTPA*, 24 S. TEX. L.J. 207, 208 (1983) (category of "merchant" deleted as exception to "consumer").

35. See TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1984). The word "use" in the definitions of "goods" and "services" is the only reference given to describe the instances under which goods and services are protected under the DTPA. See *id.* § 17.45(1), (2).

36. See *Otto, Inc. v. Cotton Salvage & Sales*, 609 S.W.2d 590, 593 (Tex. Civ. App.—Corpus Christi 1980, writ dismissed) (since legislature did not define "use," ordinary meaning of word and construction principles of DTPA apply); see also D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.04, at 27 (2d ed. 1983) (meaning of "use" must be derived from other sources since not defined in Act); Patton, *Case Law Under the Texas Deceptive Trade Practices-Consumer Protection Act*, 33 BAYLOR L. REV. 533, 554 (1981) (since "use" not defined in Act, courts have differed as to whether resale is "use").

37. See, e.g., *Otto, Inc. v. Cotton Salvage & Sales*, 609 S.W.2d 590, 593 (Tex. Civ. App.—Corpus Christi 1980, writ dismissed) ("use" defined as "a method or manner of employment of property that consists in its employment, occupation, exercise or practice") (quoting WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 978 (1965)); *Beggs v. Texas Dep't of Mental Health & Mental Retardation*, 496 S.W.2d 252, 254 (Tex. Civ. App.—San Antonio 1973, writ refused) ("use" defined as "to put or bring into action or service; to employ for or apply to a given purpose") (quoting WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 2012 (2d ed. 1970)); *James Stewart & Co. v. Mobley*, 282 S.W.2d 290, 294 (Tex. Civ. App.—Dallas 1955, writ refused) ("use" defined as "to employ for accomplishment of a purpose; to apply to one's service; to avail oneself of").

38. Compare *Voss v. May*, 646 S.W.2d 606, 608 (Tex. App.—Fort Worth 1983, writ dismissed) (purchaser for resale of assets of automobile dealership denied DTPA protection) with *Bamujally v. MacDonough*, 508 F. Supp. 574, 577 (S.D. Tex. 1981) (purchaser of soft drinks in United States for resale in Saudi Arabia protected under DTPA); see also Perrin, *Standing to Sue and the Damage Provision: Two Controversial and Dynamic Concepts Under the DTPA*, 24 S. TEX. L.J. 207, 212-13 (1983) (courts divided as to whether purchase for resale is "use"). Since statutes of other jurisdictions fail to precisely define key terms, a conflict similar to that in Texas can be observed among certain states. See Cohan, *The Rights and Duties of Retail Merchants Under State Consumer Protection Laws: Emergent Doctrines and Strategies of the Defense*, 18 NEW ENG. L. REV. 297, 299-300 (1982-1983) (absence of precise definitions facilitates pursuit of diverse consumer protection goals).

39. 489 F. Supp. 256 (W.D. Tex. 1980) (diversity case applying Texas law).

40. See *id.* at 259 (court determined only relevant fact is whether irrigation systems were purchased for resale).

vertised rebates.<sup>41</sup> Although the dealer argued that the term "use" was broad enough to include goods purchased for resale,<sup>42</sup> the court upheld the manufacturer's contention that in buying irrigation systems for resale the plaintiff did not "consume" them,<sup>43</sup> and, thus, the dealer was not protected by the provisions of the DTPA.<sup>44</sup>

Conversely, the decision of the Corpus Christi court of appeals in *Otto, Inc. v. Cotton Salvage & Sales*<sup>45</sup> is representative of those cases in which the courts have recognized that a purchase for resale is a "use," and that, therefore, a purchaser for resale is a "consumer" under the DTPA.<sup>46</sup> In *Otto*, the plaintiff, who purchased cotton to be resold in Taiwan,<sup>47</sup> was allowed recovery under the DTPA for damages caused by the defendant's delivery of cotton.<sup>48</sup> The court recognized that in purchasing the cotton, the purchaser used the cotton for his own purpose, which was resale for profit, and that he, therefore, was a "consumer" within the meaning of the DTPA.<sup>49</sup> The Texas Supreme Court has recently settled the conflict illustrated by the decisions in *Otto* and *South Texas Irrigation Systems*.<sup>50</sup>

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41. *See id.* at 257 (recovery denied under DTPA because purchaser for resale not "consumer").

42. *See id.* at 258 (plaintiff argued "use" should be given "common and ordinary meaning").

43. *See id.* at 258 (consuming is not buying and reselling).

44. *See id.* at 258; *see also* *Voss v. May*, 646 S.W.2d 606, 608 (Tex. App.—Fort Worth 1983, writ dismissed) (purchaser for resale of assets of automobile dealership denied DTPA protection because court used case law rendered prior to current amendment); *Ratcliff v. Trenholm*, 596 S.W.2d 645, 649 (Tex. Civ. App.—Tyler 1980, writ refused n.r.e.) (since consumer defined as "one who uses (economic) goods and so diminishes or destroys their [utility]," court denied DTPA protection to person building residences for resale) (quoting *Ex parte Mehlman*, 75 S.W.2d 689, 690 (1934)), *rev'd on other grounds*, 646 S.W.2d 927 (Tex. 1983); *Person v. Latham*, 582 S.W.2d 246, 249 (Tex. Civ. App.—Beaumont 1979, writ refused n.r.e.) (purchaser of land for resale could not recover under 1975 version of DTPA); *Trial v. McCoy*, 553 S.W.2d 199, 201 (Tex. Civ. App.—El Paso 1977, no writ) (no recovery under original version of DTPA where purchaser of antique pistol was merchant).

45. 609 S.W.2d 590 (Tex. Civ. App.—Corpus Christi 1980, writ dismissed).

46. *See id.* at 595 (purchaser of cotton for resale not precluded from DTPA protection).

47. *See id.* at 595 (purchase made to comply with preexisting contracts).

48. *See id.* at 592 (plaintiff had to make settlements due to poor quality of cotton).

49. *See id.* at 593-94; *see also* *Bamujally v. MacDonough*, 508 F. Supp. 574, 577 (S.D. Tex. 1981) (purchaser of soft drinks in United States for resale in Saudi Arabia protected under DTPA); *Rotello v. Ring Around Prods.*, 614 S.W.2d 455, 459 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ refused n.r.e.) (since limited definition of "services" should not be extended to that of "goods," commercial or business use is not excluded from DTPA); *Johns-Manville Sales Corp. v. R.J. Reagan Co.*, 577 S.W.2d 341, 346 (Tex. Civ. App.—Waco 1979, writ refused n.r.e.) (sale of roofing materials to be used on job protected under 1975 version of Act).

50. *See* *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 759 (Tex. 1984) (court adopts holding in *Otto*). *Compare* *Otto, Inc. v. Cotton Salvage & Sales*, 609 S.W.2d 590, 595 (Tex. Civ. App.—Corpus Christi 1980, writ dismissed) (purchase for resale is "use," therefore,

In *Big H Auto Auction v. Saenz Motors*,<sup>51</sup> the Texas Supreme Court granted DTPA protection to a merchant who purchased goods for resale.<sup>52</sup> Writing for the majority, Justice Campbell noted that since the cause of action arose in 1978, the 1977 version of the DTPA should control to determine whether the plaintiff had standing to bring a cause of action under the DTPA.<sup>53</sup> The court found, however, that mere application of the DTPA would not resolve the issue, because Saenz's standing as a consumer to sue under the DTPA depended upon the use for which the automobiles were purchased, and the legislature failed to define "use."<sup>54</sup> Therefore, in order to determine whether the legislature intended "use" to include purchase for resale, the court studied the legislative history of the DTPA<sup>55</sup> and concluded that the intent was to remove "all possible restriction on the word use."<sup>56</sup> Driven by the mandate of section 17.44 of the DTPA that the Act "should be liberally construed,"<sup>57</sup> the court explicitly rejected several definitions of the word "use" as applied in prior case law.<sup>58</sup> It determined that in order to achieve the underlying purposes of

purchaser for resale is "consumer") with *South Texas Irrigation Systems v. Lockwood Corp.*, 489 F. Supp. 256, 257 (W.D. Tex. 1980) (purchaser for resale is not consumer). In holding a purchase for resale was a "use," the Texas Supreme Court expressly disapproved of the contrary holding in *Voss*, in which writ was dismissed. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 759 (Tex. 1984).

51. 665 S.W.2d 756 (Tex. 1984).

52. See *id.* at 759 (purchaser for resale is "consumer").

53. See *id.* at 757.

54. See *id.* at 757 (legislature also failed to define scope of DTPA); see also *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 178 (Tex. 1980) (definition of "service" ineffectively defines term); Patton, *Case Law Under the Texas Deceptive Trade Practices-Consumer Protection Act*, 33 BAYLOR L. REV. 533, 554 (1981) ("use" not defined in DTPA).

55. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 757-58 (Tex. 1984).

56. See *id.* at 757-58. When Senate bill 48 was introduced in 1975, adding the word "final" to the definitions of "goods" and "services," a floor debate arose between Sen. Mauzy and Sen. Meier as to whether the word "final" should be stricken from those definitions. See Debate on Tex. S.B. 48 on the Floor of the Senate, 64th Leg. 222-23 (Feb. 10, 1975) (transcript available from Senate Staff Services Office). The word "final" was deleted following the testimony of G. Fondren of the Texas Automobile Dealers Association. See *id.* at 222. Fondren stressed that if "use" was restricted to final use, automobile dealers would lose standing to sue companies or individuals who sell products which are intended to be sold to dealers' consumers. See *The Texas Deceptive Trade Practices-Consumer Protection Act: Hearings on Tex. S.B. 48 Before the Senate Human Resource Comm.*, 64th Leg. 22-27 (Feb. 3, 1975), cited in D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.01, at 30 (2d ed. 1983).

57. See TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1984).

58. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 758 (Tex. 1984); see also *Beggs v. Texas Dep't of Mental Health & Mental Retardation*, 496 S.W.2d 252, 254 (Tex. Civ. App.—San Antonio 1973, writ ref'd) ("use" means "to put or bring into action or service; to employ for or apply to a given purpose"); *Southwestern Tel. & Tel. Co. v. City of Dallas*, 174 S.W. 636, 641 (Tex. Civ. App.—Dallas 1915, writ ref'd) ("use" means "to make

the DTPA,<sup>59</sup> a purchaser for resale, however, should be a "consumer" under the DTPA.<sup>60</sup>

The Texas Supreme Court, in *Big H*, has settled a controversy which has divided Texas courts for many years.<sup>61</sup> The court examined the legislative history of the DTPA in order to effectuate the Act's underlying purpose.<sup>62</sup> Under the 1973 enactment of the DTPA, and its 1975 amendment, commercial or business use of goods was implicitly excluded from protection.<sup>63</sup>

use of; to convert to one's own service; to put to a purpose; to hold, occupy, enjoy, or take the benefit of"). The *Big H* court rejected these narrow definitions and reaffirmed its holding in *Pennington v. Singleton*, 606 S.W.2d 682, 686 (Tex. 1980), that "a court is not necessarily confined to the literal meaning of the words used and that legislative intent rather than the strict letter of the Act will control." See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 758 (Tex. 1984). Therefore, the court concluded that "to limit use" would be contrary to the statutory mandate of § 17.44 on construction and application of the DTPA. See *id.* at 758.

59. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 758 (Tex. 1984). The underlying purposes of the DTPA are "to protect consumers against false misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient economical procedures to secure such protection." See *id.* at 758.

60. See *id.* at 759. The court specifically rejected all cases which held that a purchaser for resale is not a consumer. See *id.* at 759.

61. See *id.* at 758 (court rejected all cases holding "a purchase for resale is not a use"); see also *Jenkins, Attempting a Balance: The 1979 Amendments to the Texas Deceptive Trade Practices-Consumer Protection Act*, 11 TEX. TECH L. REV. 1, 19-21 (1979) (1979 amendments did not resolve issue "[w]hether inventory is within the definition of 'goods' purchased or leased for 'use' under Section 17.45(1)"); *Perrin, Standing to Sue and the Damage Provision: Two Controversial and Dynamic Concepts Under the DTPA*, 24 S. TEX. L.J. 207, 212 (1983) (Texas courts are divided as to whether resale transactions fall within scope of DTPA).

62. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 758 (Tex. 1984) (legislative intent should control determination of issue); see also *United States Steel Corp. v. Fiberglass Specialties*, 638 S.W.2d 950, 954 (Tex. Civ. App.—Tyler 1982, no writ) (quoting TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1984)). "This subchapter . . . shall be . . . applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." See TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1984).

63. See *Ratcliff v. Trenholm*, 596 S.W.2d 645, 649 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (definitions of "goods" and "services" allow inference that "purchase of goods for commercial purposes" is "not within the contemplation of the DTPA"); D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.01, at 32 (2d ed. 1983) (originally "use" employed to exclude goods and services purchased for business purposes); see also *Deceptive Trade Practices-Consumer Protection Act*, ch. 143, sec. 1, § 17.45(1), (2), 1973 Tex. Gen. Laws, Gen. & Spec. 322, 323 (amended 1975, 1977) (current version at TEX. BUS. & COM. CODE ANN. § 17.45(1), (2) (Vernon Supp. 1984)). "[G]oods" were defined as "tangible chattels bought for use," and "services" as "work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods." *Id.* The original version of the DTPA covered only those particular goods which were normally acquired "for personal, family, or household purposes." See D.

The proposed 1975 amendment restricted the use of “goods” and “services” to use by “final” consumers, but this limitation was stricken from the DTPA before its adoption.<sup>64</sup> Had the legislature intended to preserve this narrow scope of the DTPA, then it would have included the term “final use” in the 1975 definition of “goods” and “services.”<sup>65</sup> By deleting the word “final” from the 1975 proposed amendment, the legislature indirectly expanded the scope of the DTPA to entities whose business it is to buy and resell goods and services.<sup>66</sup> When, in 1977, the “commercial or business” exception was removed from the definition of “services,” “goods or services acquired for any purpose” were brought within the application of the DTPA.<sup>67</sup> By excluding from protection “business consumers” with assets in excess of 25 million dollars in the 1983 amendment, the legislature again implicitly recognized that the DTPA applies to other non-excluded business consumers.<sup>68</sup> The legislative history of the DTPA thus indicates that “goods” not only relates to goods purchased for physical consumption, but also to those purchased for resale.<sup>69</sup> It appears, therefore, that the court’s decision is clearly in line with the legislative intent, which took ten years to mature, to encompass almost all levels of commercial transactions.<sup>70</sup>

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BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.01, at 32 (2d ed. 1983).

64. See D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.01, at 32 (2d ed. 1983) (use of “goods” and “services” limited to use “for personal, family, or household purposes”).

65. See *id.* § 2.01, at 32.

66. See *id.* § 2.01, at 32-33.

67. Compare Deceptive Trade Practices-Consumer Protection Act, ch. 143, sec. 1, § 17.45(2), 1973 Tex. Gen. Laws, Gen. & Spec. 322, 323 (commercial or business use excluded from “services”) (amended 1975, 1977) (current version at TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon Supp. 1984)) with Deceptive Trade Practices-Consumer Protection Act, ch. 216, sec. 1, § 17.45(2), 1977 Tex. Gen. Laws, Gen. & Spec. 600, 600 (commercial or business use not excluded from “services”) (codified at TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon Supp. 1984)); see also D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.01, at 32 (2d ed. 1983). The enactment of the 1975 amendments without the inclusion of “final” in the definitions of “goods” and “services” indicate the legislative intent not to limit “use” to “final use.” See *id.* at 32.

68. See TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1984). The 1983 amendment did not affect the decision of the court because the cause of action arose under the application of the 1977 version of the DTPA. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 757 (Tex. 1984).

69. See D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.01, at 33 (2d ed. 1983) (since business entities were added to consumer, it would be illogical to exclude purchase for resale).

70. Compare TEX. BUS. & COM. CODE ANN. § 17.45(1), (4) (Vernon Supp. 1984) (broad definitions of “goods” and “consumers”) and *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 759 (Tex. 1984) (purchaser for resale “consumer” for DTPA purposes) with Deceptive Trade Practices-Consumer Protection Act, ch. 143, sec. 1, § 17.45(1), (4), 1973

The present decision of the Texas Supreme Court has departed from the DTPA's initial purpose of protecting individuals from the effects of unequal bargaining power with merchant sellers.<sup>71</sup> The court has furthered the legislative intent of broadening the scope of the DTPA, to the extent that it now protects the commercial transactions between parties who are not "consumers" within the strict meaning of the word.<sup>72</sup> This extension entails the inevitable possibility of substantial liability at any level of the market structure for a strict liability violation of a statute which offers very few defenses.<sup>73</sup> A market participant will shift this potential liability to the insurance company which will provide the best coverage for the lowest price.<sup>74</sup> The burden of such cost will unavoidably increase the overall cost of doing business.<sup>75</sup> In a free enterprise system, efficiency dictates that the

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Tex. Gen. Laws, Gen. & Spec. 322, 323 (1973 version of DTPA contained narrow definitions of "goods" and "consumers") and *Trial v. McCoy*, 553 S.W.2d 199, 201 (Tex. Civ. App.—El Paso 1977, no writ) (purchaser of antique pistol merchant under original Act, therefore not consumer). The interpretation of the DTPA set forth in *Big H* establishes Texas as a forerunner in the area of consumer protection. See *Big H Auto Auction v. Saenz Motors*, 665 S.W.2d 756, 759 (Tex. 1984) (purchase for resale protected under DTPA); accord *Wilkinson v. Smith*, 639 P.2d 768, 770-73 (Wash. App. 1982) (purchasers of land for resale protected under Unfair Business Practices—Consumer Protection Act, WASH. REV. CODE ANN. § 19.86 (1978 & Supp. 1984-1985)). The state of consumer protection law in some jurisdictions remains similar to that of the 1973 version of the Texas DTPA, which limited consumer protection to goods acquired for other than business or commercial purposes. See, e.g., *Sumner v. Adel Banking Co.*, 259 S.E.2d 32, 34 (Ga. 1979) (notes not consumer transactions where loans and farm equipment obtained for farming business); *PPG Indus. Can. v. Kreuzer*, 281 N.W.2d 762, 770 (Neb. 1979) (purchaser refers to ultimate consumer); *Miller v. Hubbard-Wray Co.*, 630 P.2d 880, 885 (Or. Ct. App. 1981) (no consumer protection for purchaser of bailer obtained for bailing hay to feed cattle). Other jurisdictions have adopted a more liberal approach and have extended consumer protection to businessmen. See KAN. STAT. ANN. § 50-624(b) (1976) (businessmen protected under Kansas consumer protection act); N.Y. GEN. BUS. LAW § 349(h) (McKinney Supp. 1983-1984) (businessmen can maintain private cause of action under local consumer protection statute). But see *Musil v. Hendrich*, 627 P.2d 367, 371-72 (Kan. Ct. App. 1981) (transaction between farmers not protected because of equal bargaining position).

71. See 18 TEX. INT'L L.J. 369, 370 (1983) (DTPA's initial purpose to protect against unequal bargaining power).

72. See *id.* at 370 (DTPA extended to commercial transactions).

73. See *id.* at 377 (DTPA strict liability statute). Under the DTPA, a prima facie violation is shown "when a false, misleading, or deceptive act or practice as defined in section 17.46 of the Act is a producing cause of actual damages to a consumer." See *id.* at 377.

74. Cf. Comment, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 UCLA L. REV. 401, 438 (1974) (insurance is buffer against pressure of liability).

75. Cf. *id.* at 437. A "social cost" of a service is defined as "the current price plus the additional increment of cost represented by the risk of non-negligent accidents." See *id.* at 473; see also Steiner, *The Legalization of American Society: Economic Regulation*, 81 MICH. L. REV. 1285, 1302-03 (1983) (increased regulation perceived to increase cost of doing business).

prices of goods and services represent their "full social cost";<sup>76</sup> therefore, the cost increase will ultimately be passed on to the final consumer.<sup>77</sup> In order for this to be economically justified, the overall benefit to the community must outweigh the burden on the final consumer, unless there is some contrary independent and compelling policy.<sup>78</sup>

When enacted, the DTPA was intended to remedy the problems caused by the unequal bargaining power between consumers and business entities. Efforts to protect only the "final" consumer, however, created an inherent unfairness for certain market participants involved as purchasers for resale. A retailer, while liable to its consumers, was denied DTPA protection for injuries resulting from its purchases from other market participants. The recognition by the Texas Supreme Court that a purchase for resale is a "use" under the DTPA has drawn the development of Texas consumer protection to a rational conclusion. While granting a better protection to merchants in their dealings with each other, however, this approach will have far-reaching economic consequences which, in the final analysis, will have to be borne by the ultimate consumer.

*Vincent P. Dhooghe*

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76. See Comment, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 UCLA L. REV. 401, 436 (1974). When goods and activities reflect their social cost, which is the cost they impose on society, then the "best product and activity mix" is achieved. See Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 723 (1965). The purpose behind social cost is deterrence against infringement. See *id.* at 722.

77. See Comment, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 UCLA L. REV. 401, 437 (1974) (prices, including social costs, charged to purchasers); see also Steiner, *The Legalization of American Society: Economic Regulation*, 81 MICH. L. REV. 1285, 1303 (1983) (beneficiaries of regulation pay cost directly).

78. See R. POSNER, *THE ECONOMICS OF JUSTICE* 88, 93 (1981). Under the Pareto superiority doctrine, in order for one allocation of resources to be superior to another, at least one person must be better off under the first than under the second, and no one can be worse off. See *id.* at 88. Under the Kaldor-Hicks criterion, it is sufficient that the increase in value be large enough to fully compensate the loser. See *id.* at 91.