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An Understanding of Damages Recoverable under the DTPA.

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AN UNDERSTANDING OF DAMAGES RECOVERABLE UNDER THE DTPA

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I. INTRODUCTION

The Texas Deceptive Trade Practices — Consumer Protection Act

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("DTPA") provides that a successful consumer may recover "the amount of actual damages found by the trier of fact."[1] The term "actual damages" is not defined in the DTPA. Because there are no formulas or guidelines in the DTPA itself to aid litigants in determining the types or measures of damages available to a DTPA plaintiff, case authority must be considered in determining this issue. The Texas Supreme Court has held that "actual damages" should be construed to mean those damages which are recoverable at common law.[2] The supreme court has also consistently ruled that the DTPA embraces any measure of damages which affords the consumer the greatest recovery.[3] The purpose of this article is to discuss the requirements for pleading damages, the case law regarding the types of damages, and finally the evidentiary and defensive considerations.

II. THE REQUIREMENTS FOR PLEADING DAMAGES

There are two categories of damages: general and special. The classification of damages as either general or special is important in determining the requirements for pleading damages. General damages are those that naturally and necessarily flow from the wrongful act and are recoverable under a general allegation of damages.[4] Special damages are those actual damages that flow naturally, but not necessarily, from the wrongful act that is the subject of the complaint[5] and must be specially pleaded to be recovered.[6]

The general damages in a DTPA case would include damages cal-

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1. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987).

2. Farrell v. Hunt, 714 S.W.2d 298, 300 (Tex. 1986); Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).

3. *See, e.g.*, W.O. Bankston Nissan, Inc. v. Walters, 754 S.W.2d 127, 128 (Tex. 1988)(DTPA plaintiff may recover larger of "out of pocket" damages or "benefit of bargain" damages); Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985)(DTPA plaintiff allowed greatest amount of actual damages actually proved); Smith v. Baldwin, 611 S.W.2d 611, 617 (Tex. 1980)(actual damages equal total loss).

4. *See* Sherrod v. Bailey, 580 S.W.2d 24, 28 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.)(general prayer sufficient to support relief consistent with petition and evidence); El Paso Dev. Co. v. Ravel, 339 S.W.2d 360, 364 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.)(under general damages, plaintiff entitled to recover direct and natural damages).

5. *See Sherrod*, 580 S.W.2d at 28 (special damages are proximate result but unusual); Humble Pipe Line Co. v. Day, 172 S.W.2d 356, 358 (Tex. Civ. App.—Waco 1943, writ ref'd w.o.m.)(special damages usually not foreseen or anticipated).

6. TEX. R. CIV. P. 56 (special damages must be specifically stated); *see* Weingarten's, Inc. v. Price, 461 S.W.2d 260, 263 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.)(if want to recover for particulars, must specifically plead).

culated under the "out-of-pocket" or "benefit of the bargain" measures.[7] These measures of damages are discussed in section III of this paper. The classification of actual damages as special damages is largely dependent on the facts of each case and will ordinarily vary with each individual case.[8] Examples of damages that are normally treated as special damages include loss of earnings[9] and loss of profits.[10]

This author is aware of no case which directly addresses the classification of damages as general or special in the DTPA context. In order to avoid the consequences of a successful objection by defendant at trial to the admission of evidence regarding a specific element of damage because it has not been specially pleaded, the better practice is to plead all elements of damages sought. The governing principle regarding the specificity with which special damages must be pleaded is that the pleadings must provide fair notice to the defendant.[11]

Defense counsel must be alert during trial and object to any evidence of special damages not specially pleaded. Failure to object may constitute a waiver of defendant's opposition to the plaintiff's recovery of said damages.[12]

III. GENERAL MEASURE OF DAMAGES

A. *"Out-of-Pocket"*

As discussed in the introduction of this paper, the Texas Supreme Court has defined actual damages as those recoverable at common

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7. *See* Johnson v. Willis, 596 S.W.2d 256, 262-63 (Tex. Civ. App.—Waco)(describes "out-of-pocket" and "loss of bargain" rules as standards for measuring general damages), *rev'd on other grounds*, 603 S.W.2d 828 (Tex. 1980).

8. *See* Hycel, Inc. v. American Airlines, Inc., 328 F. Supp. 190, 194 (S.D. Tex. 1971)(determination of special damages dependent upon circumstances of particular case).

9. *Weingarten's*, 461 S.W.2d at 264 (loss of earning held as special damages).

10. Kulms v. Jenkins, 557 S.W.2d 149, 154 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.)(lost profits considered special damages); *Weingarten's*, 461 S.W.2d at 264 (loss of profits must be specifically plead since usually considered special damages).

11. *See* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981)(pleadings sufficient if notice fairly given to opposition); Ghazali v. Southland Corp., 669 S.W.2d 770, 774-75 (Tex. App.—San Antonio 1984, no writ)(interpreting procedural rules 45 and 47 to require pleading to give fair notice).

12. *See* La Marque Indep. School Dist. v. Thompson, 580 S.W.2d 670, 673 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(by not objecting to special damages, defendant waived objections); TEX. R. CIV. P. 67 (issues not raised by pleading but tried with express or implied consent are treated as if plead).

law.[13] Texas courts have, therefore, turned to common law for guidance in determining the proper measure of damages in a DTPA case.[14] Under common law, there are two recognized measures of damages for misrepresentation.[15] One measure of damages is known as the " 'out-of-pocket' measure, which is the 'difference between the value of that which was parted with and the value of that which was received.' "[16] In other words, it is measured by determining the difference between the value given (or the price paid) and the value received.[17] The out-of-pocket measure is applied at the time of sale.[18]

B. *"Benefit of Bargain"*

The second measure of damages is known as the " 'benefit of the bargain' measure, which is the difference between the value as represented [or warranted] and the value actually received."[19] This mea-

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13. Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).

14. *See* W.O. Bankston Nissan, Inc. v. Walters, 754 S.W.2d 127, 128 (Tex. 1988)(court looked to common law to determine damages); Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 373 (Tex. 1984)(court utilized common law in DTPA action to determine damages); Chrysler Corp. v. McMorries, 657 S.W.2d 858, 864 (Tex. App.—Amarillo 1983, no writ)(common law established actual damages in DTPA suit).

15. *See Bankston Nissan*, 754 S.W.2d at 128 ("out-of-pocket" damages and "benefit of bargain" damages are two basic common-law damage theories for misrepresentation); *Leyendecker*, 683 S.W.2d at 373 (court discusses "out-of-pocket" and "benefit of bargain" damages); Sobel v. Jenkins, 477 S.W.2d 863, 868 (Tex. 1972)("out-of-pocket" and "benefit of bargain" are two common-law theories).

16. *Bankston Nissan*, 754 S.W.2d at 128.

17. *See id.*; *McMorries*, 657 S.W.2d at 864 (defining "out-of-pocket" damages). The Dallas Court of Appeals has applied the out-of-pocket measure as the correct measure of damages in a "DTPA action based upon the sale of an automobile." Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 801 (Tex. App.—Dallas 1987, no writ)(damages based on difference between actual cost of vehicle and value of vehicle as delivered in its defective condition); *see also* Vista Chevrolet, Inc. v. Lewis, 704 S.W.2d 363, 371 (Tex. App.—Corpus Christi 1985)(DTPA action in which court held out of pocket damages to be price paid minus fair market value of auto in defective condition), *aff'd in part and rev'd in part*, 709 S.W.2d 176 (Tex. 1986).

18. *See Leyendecker*, 683 S.W.2d at 373 ("out of pocket damages" calculated at instance of sale). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 110 (4th ed. 1971)(discussing calculation of "out-of-pocket" damages).

19. W.O. Bankston Nissan, Inc. v. Walters, 754 S.W.2d 127, 128 (Tex. 1988); Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 373 (Tex. 1984). This measure of damages has also been referred to as the "loss of bargain" rule. *See* Chrysler Corp. v. McMorries, 657 S.W.2d 858, 864 (Tex. App.—Amarillo 1983, no writ). The Dallas Court of Appeals explained this measure of damages as the "difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in

sure is the same measure of damages applied in a breach of warranty action under the Texas Uniform Commercial Code.[20] Section 2.714(b) of the Texas Uniform Commercial Code provides that the "measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."[21]

1. Exception to General Rule

Several appellate courts have recognized an exception to the benefit of the bargain rule when the product as received is valueless because of its defective condition.[22] If this exception applies, the appropriate measure of damages is the purchase price.[23] Similarly, when repairs are rendered valueless, the cost of those repairs is the appropriate measure of damages.[24]

2. Proof Regarding Market Value

The market value of the goods or services as represented or warranted may be established by proof of the actual sales price or the price set by the seller.[25] The market value of the goods as received

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which it should have been delivered according to the contract of the parties." Raye v. Fred Oakley Motors, Inc. 646 S.W.2d 288, 290 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

20. TEX. BUS. & COM. CODE ANN. § 2.714(b) (Tex. UCC)(Vernon 1968)(codification of common-law benefit of bargain rule).

21. *Id.*

22. *See, e.g., Raye*, 646 S.W.2d at 290 (court recognized exception where product worthless); Chrysler Corp. v. Schuenemann, 618 S.W.2d 799, 805 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.)(exception to "benefit of bargain" rule applies when product without value); Smith v. Kinslow, 598 S.W.2d 910, 913 (Tex. Civ. App.—Dallas 1980, no writ)(exception to general rule when product worthless).

23. *See, e.g.*, Raye v. Fred Oakley Motors, Inc., 646 S.W.2d 288, 290 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)(when exception applicable, purchase price is correct standard to measure damages); *Schuenemann*, 618 S.W.2d 799, 805 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.)(purchase price correct measure when product worthless).

24. *See Raye*, 646 S.W.2d at 290 (if repairs are valueless, then cost of such repairs is proper measure of damages); *Kinslow*, 598 S.W.2d at 913 (cost of repairs is proper measure when services rendered are worthless).

25. *See, e.g.*, Lone Star Ford, Inc. v. McGlashan, 681 S.W.2d 720, 725 (Tex. App.—Houston [1st Dist.] 1984, no writ)(trial court considered interest in finance charges in determining purchase price of vehicle); *Raye*, 646 S.W.2d at 290 (market value may be established by price set by vendor); *Schuenemann*, 618 S.W.2d at 805 (market value established by seller's price).

must be established at the time the goods were accepted or delivered.[26] Evidence regarding the market value of goods at the time of trial or at the time the consumer's petition is filed is no evidence of the good's value at the time of acceptance[27] and will not support a consumer's recovery of damages under the "benefit of the bargain" rule.

Evidence regarding the market value of goods may be established by opinion testimony offered by an expert witness retained to appraise the property in question or may be given by the owner of the property. An owner of personal property may be qualified to testify about the market value of similar property belonging to someone else.[28] In order for an owner to qualify to testify regarding market value, it must be shown that the owner's opinion refers to the market value of the property and not to its intrinsic value.[29] This can be shown merely by the owner testifying that he is familiar with or knows the market value of his property.[30]

C. *Cost of Repairs*

An alternative measure of damages often used in construction contract cases is the cost of repairs.[31] Cost of repairs is allowed if correction or repair of the defective structure is economically feasible, would not involve unreasonable economic waste, and would not impair the

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26. *See* Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 802-03 (Tex. App.—Dallas 1987, no writ)(judgment reversed due to no evidence of market value at time product received); Overseas Motors Corp. v. First Century Christian Church, Inc., 608 S.W.2d 288, 290 (Tex. Civ. App.—Dallas 1980, no writ)(reversed due to insufficient evidence of market value at time automobile was accepted); *cf. McGlashan*, 681 S.W.2d at 725 (although appellate court correctly stated measure of damages as being the "difference at the time and place of acceptance" court affirmed trial court's award of damages as purchase price of vehicle based on evidence that market value of vehicle at time of trial was zero).

27. *See Gray*, 730 S.W.2d at 802 (opinion must be based on market value); Mercedes-Benz of N. Am., Inc. v. Dickenson, 720 S.W.2d 844, 848-50 (Tex. App.—Fort Worth 1986, no writ)(opinion must be based on market value not intrinsic factors).

28. *See* Porras v. Craig, 675 S.W.2d 503, 504 (Tex. 1984)(owner of land allowed to testify as to its value).

29. *See id.* at 505 (opinion must be based on extrinsic factors and market value); *Gray*, 730 S.W.2d at 802 (opinion must be based on market value); *Dickenson*, 720 S.W.2d at 848-50 (opinion must be based on market value not intrinsic value).

30. *See Porras*, 675 S.W.2d at 505 (market value may be established by owner if asked if familiar with market value of property).

31. *See, e.g.*, Jim Walter Homes, Inc. v. Mora, 622 S.W.2d 878, 883 (Tex. App.—Corpus Christi 1981, no writ)(court allowed cost of repairs since not unreasonable economic waste); Young v. DeGuerin, 591 S.W.2d 296, 299 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)(plaintiff may recover cost of remedying defects in construction cases).

structure as a whole.[32] On the other hand, if correction of the defects would require that the structure be materially changed or the cost of repairs would be substantial, the correct measure of damages "would be the difference in the value of the [structure] as constructed and its value had it been constructed without defects or deviations."[33]

IV. Recovery of Related Expenses or Damages

The Texas Supreme Court has held that an aggrieved consumer may recover the greatest amount of damages which can be factually shown to have been caused by the deceptive act, including related and necessary expenses.[34] The following is a discussion of the damages and expenses more frequently claimed in DTPA cases. It is by no means an exhaustive list.

A. *Loss of Use*

An injured consumer is entitled to recover damages for loss of use of the product in question.[35] This element of damage is sought most frequently in automobile cases.[36] In such cases, damages for loss of use can be established by proof of the reasonable rental value of a

32. *See, e.g., Mora*, 622 S.W.2d at 883 ($4,070 cost of repair not unreasonable economic waste); Greene v. Bearden Enter., Inc., 598 S.W.2d 649, 652 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.)(correction of defects would not impair structure so cost to remedy proper measure of damages); *Young*, 591 S.W.2d at 299-300 ($15,000 to repair not unreasonable cost so such cost was amount of damage); *see also* Brighton Homes, Inc. v. McAdams, 737 S.W.2d 340, 343-44 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.)(recovery of costs to repair slab around building's foundation allowed); Roy E. Thomas Constr. Co. v. Arbs, 692 S.W.2d 926, 934-35 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.)(cost of repairing foundation and exterior bricks allowed).

33. Miller v. Dickenson, 677 S.W.2d 253, 258 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *see also Mora*, 622 S.W.2d at 883 (defining measure of damages for cost of repair). Costs of repairs are also allowed as an alternative measure of damages in automobile cases. *See* Jordan Ford, Inc. v. Alsbury, 625 S.W.2d 1, 2 (Tex. Civ. App.—San Antonio 1981, no writ)($395 cost of repair for van allowed).

34. *See* Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985)(reasonably related and necessary expenses are allowable part of consumer's damages).

35. *See* Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 118-19 (Tex. 1984)(recovery for loss of use of automobile allowed); Ryan v. Thurmond, 481 S.W.2d 199, 206 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.)(loss value of use of building recoverable when such damages result from contractor's failure to perform contract in due time).

36. *See, e.g., Luna*, 667 S.W.2d at 118-19 (loss of use of auto element of actual damages); Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 804 (Tex. App.—Dallas 1987, no writ)(court allowed loss of use of car as actual damages); Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 790 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)(loss of use of plaintiff's truck element of actual damages).

substitute vehicle.[37] The plaintiff is not required, as a prerequisite for recovery, to actually spend any money to rent a replacement vehicle or to spend any money for alternative transportation.[38] Further, the plaintiff is allowed to recover these damages for the period of time of deprivation of use of the vehicle.[39]

Alternatively, the injured consumer may choose to seek recovery for the cost of buying a replacement vehicle, if the reasonable rental value would exceed the cost of purchasing a replacement vehicle.[40] In *Town East Ford Sales, Inc. v. Gray*,[41] the Dallas Court of Appeals affirmed the trial court's award of damages for the cost of buying a replacement vehicle. The Dallas court saw no reason why the plaintiff "may not recover his damages for loss of use of the car simply because he chose to buy another car rather than rent one."[42] The Dallas court was persuaded by the fact that the plaintiff actually mitigated his damages by purchasing a replacement vehicle rather than paying an exorbitant amount to rent a vehicle.[43]

B. *Loss of Profits*

Another element of damages recoverable in a DTPA case is lost profits.[44] In order to recover damages for lost profits, the plaintiff must establish the amount sought with reasonable certainty.[45] In

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37. *See Luna*, 667 S.W.2d at 18-19 (reasonable rental value of substitute sufficient to support award of damages).

38. *See id.* at 118 (plaintiff not required to rent or otherwise spend money); *Gray*, 730 S.W.2d at 804 (plaintiff need not show amount actually expended).

39. *See* Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 119 (Tex. 1984)(plaintiff compensated for time deprived of auto); *Gray*, 730 S.W.2d at 804 (period of compensatory loss is time plaintiff deprived of car).

40. *See Gray*, 730 S.W.2d at 804. Instead of paying $804 a month to rent a replacement vehicle, Gray, the plaintiff, purchased a replacement vehicle for $167 a month. *Id.* The court noted that Gray actually mitigated his damages and, therefore, saw no reason why he could not recover the cost of purchasing the replacement. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*; *see also* Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 924 (Tex. App.—Waco 1985, writ dism'd)(permitted recovery of replacement cost of blood chemistry analyzers when replacement mitigated damages).

44. *See, e.g.*, Kold-Serve Corp. v. Ward, 736 S.W.2d 750, 755 (Tex. App.—Corpus Christi 1987, writ dism'd)(plaintiff entitled to recover lost profits); Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 792 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)(lost profits allowed as element of damages); *Hycel, Inc.*, 690 S.W.2d at 926 (loss of profits proper element of actual damages).

45. *See, e.g.*, Keller v. Davis, 694 S.W.d 355, 356-57 (Tex. App.—Houston [14th Dist.]

some cases, the issue of causation may be difficult to resolve. The plaintiff's loss of profits may have been caused by the defendant's deceptive conduct or by other economic factors such as economic recession, undercapitalization, or declining business activity.[46]

If damages for loss of profits are alleged, it is important for defense counsel not only to conduct discovery regarding the consumer's business records and business practices, but to investigate and develop evidence regarding the particlar industry in which the consumer's business is associated. If profits ordinarily earned by the consumer are dependent upon uncertain and changing conditions such as market fluctuations, recovery for lost profits may be denied.[47]

There will be some conjecture involved in determining damages for loss of profits since it is difficult to prove the amount of lost future profits with absolute certainty. Texas courts have recognized this problem and have held that it is not necessary to prove the amount of lost profits with exact calculation.[48] It is required, however, that sufficient data be offered to ascertain lost profits with a reasonable degree of certainty.[49]

Lost profits may be demonstrated by several forms of evidence. If possible, business records should be introduced into evidence rather than relying solely on the subjective testimony of the injured business consumer.[50] In cases involving an established business, pre-existing

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1985, writ ref'd n.r.e.)(pre-existing profits proved lost profits with reasonable certainty); R.A. Corbett Transp., Inc. v. Oden, 678 S.W.2d 172, 175 (Tex. App.—Tyler 1984, no writ)(lost profits which are natural consequence and sufficiently certain are recoverable); Copenhaver v. Berryman, 602 S.W.2d 540, 544 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)(lost profits cannot be speculative or uncertain).

46. *See* Universal Commodities, Inc. v. Weed, 449 S.W.2d 106, 113 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.)(undercapitalization, not defendant's breach of contract, caused plaintiff's loss of profits).

47. *See Oden*, 678 S.W.2d at 176 (lost profits cannot be dependent upon uncertain changing condition like market fluctuation).

48. *See, e.g., Davis*, 709 S.W.2d at 792 (exact calculation of damage not necessary, calculation only needs to be reasonably certain); *Oden*, 678 S.W.2d at 176 (exact calculation of lost profits not required); *Copenhaver*, 602 S.W.2d at 544 (lost profits do not have be exactly calculated).

49. *See* White v. Southwestern Bell Tel. Co., 651 S.W.2d 260, 262 (Tex. 1983)(lost profits must be established with reasonable certainty); R.A. Corbett Transp., Inc. v. Oden, 678 S.W.2d 172, 176 (Tex. App.—Tyler 1984, no writ)(lost profits must be established with sufficient certainty).

50. *See* Automark of Texas v. Discount Trophies, 681 S.W.2d 828, 830 (Tex. App.—Dallas 1984, no writ)(recovery for lost profits permitted when based on objective documentation such as facts and figures and "not upon subjective opinions of interested parties"); Village

profits may be admissible to demonstrate the amount of lost profits.[51] Further evidence regarding the normally expected increase in business may also be considered.[52]

C. *Permanent Reduction in Market Value*

A DTPA plaintiff may also recover damages for the permanent reduction or decrease in the fair market value of a product caused by the "stigma" or "reputation" of having been defective.[53] In *Terminix International, Inc. v. Lucci*,[54] a homeowner sued a termite control company for its failure to exterminate the house for termites.[55] In addition to recovering the expense incurred in repairing the termite damage, the court allowed the homeowner to recover the permanent reduction in the market value of the house which was caused by the "stigma or bad reputation of a home that had been seriously damaged by termites."[56] The court rejected the defendant's argument that damages for permanent reduction in market value and costs to repair represent a double recovery.[57]

In *Brighton Homes, Inc. v. McAdams*,[58] the Houston Court of Appeals held that the trial court erred in disregarding the jury's award of damages for the decrease in the fair market value of a house damaged

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Square, Ltd. v. Barton, 660 S.W.2d 556, 560 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)(general statements regarding lost profits not based on facts or figures held insufficient to allow recovery of lost profits).

51. *See White*, 651 S.W.2d at 262-63 (pre-existing profits established lost profits with reasonable certainty); Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 793 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)(if established business pre-existing profits allowed to establish lost profits).

52. *See Davis*, 709 S.W.2d at 793 (court allowed consideration of normal increase in business when establishing lost profits).

53. *See* Brighton Homes, Inc. v. McAdams, 737 S.W.2d 340, 342 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.)(diminished market value due to defect should be considered in determining actual damages); Terminix Int'l, Inc. v. Lucci, 670 S.W.2d 657, 661 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)(home affected by "stigma" of defective repairs was allowed as element of actual damages).

54. 670 S.W.2d 657 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

55. *See id.* at 660.

56. *Id.* at 661.

57. *See id.* The cost of repair and subsequent diminished value are not exclusive remedies when plaintiff pleads and proves that the value of his property will be diminished even after repairs are made. *See* Century 21 Page One Realty v. Naghad, No. 9571 (Tex. App.—Texarkana 1988, no writ)(not yet reported).

58. 737 S.W.2d 340 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

by a cracked slab foundation.[59] The Houston court noted the flexibility of appellate courts in approving various types of damages in DTPA cases to allow injured consumers to recover "the greatest amount of 'actual damages' alleged and established by proof to have been factually caused by the defendant's conduct."[60]

D. *Mental Anguish*

Historically, Texas case law limited recovery for mental anguish to those instances in which there was proof of a willful tort, gross negligence, willful disregard, or mental anguish causing physical damage or injury.[61] In 1984, the Texas Supreme Court in *Luna v. North Star Dodge Sales, Inc.*,[62] expanded recovery for mental anguish to a DTPA case where the plaintiff proved that the actions of the defendant were committed knowingly.[63] The supreme court observed that while the terms "gross negligence" and "knowing" are not synonymous, "the terms lay on a continuum with gross negligence being the lowest mental state."[64] The court then reasoned that if a finding of gross negligence is a sufficient basis for recovery of mental anguish damages, then a finding of knowing conduct is also sufficient.[65] Therefore, if knowing conduct is found, a consumer may be entitled to recover damages for mental anguish without proof that the mental anguish

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59. *See id.* at 342. At trial, the plaintiff called a real estate appraiser as an expert witness. *Id.* The appraiser testified that the market value of the plaintiff's home would be adversely affected by its reputation for having had poor drainage and a cracked slab. *See id.*

60. *Id.* As support, the court cited *Building Concepts, Inc. v. Duncan*, 667 S.W.2d 897, 901 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), and *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). *See Brighton Homes*, 737 S.W.2d at 342.

61. *See* Farmers & Merchants State Bank of Krum v. Ferguson, 617 S.W.2d 918, 921 (Tex. 1981)(mental anguish not recoverable unless intentional tort or gross negligence); Duncan v. Luke Johnson Ford, Inc., 603 S.W.2d 777, 779 (Tex. 1980)(mental anguish not recoverable without willful tort or gross negligence).

62. 667 S.W.2d 115 (Tex. 1984). Recently, the Texas Supreme Court eliminated the physical manifestation or injury requirement for recovery of damages for the negligent infliction of mental anguish. *See* St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (Tex. 1987).

63. *Luna*, 667 S.W.2d at 117 (unconscionable action committed knowingly sufficient to allow recovery of mental anguish).

64. *Id.* at 118.

65. *See id.* "Knowingly" was defined by the trial court as "actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim of actual awareness of an act or practice constituting a breach of warranty, but actual awareness may be inferred when objective manifestations indicate that a person acted with actual awareness." *Id.* at 117.

manifested itself physically or resulted in a physical injury.[66] Simply proving knowing conduct alone, however, will not necessarily entitle a consumer to recover mental anguish damages. There must be some evidence that the defendant's knowing conduct was a producing cause of the consumer's mental anguish[67] and there must be sufficient evidence to prove the extent of the mental anguish suffered by the consumer in order to avoid a possible attack concerning the excessiveness of the mental anguish damage award.[68]

Subsequent to the supreme court's holding in *Luna v. North Star Dodge Sales, Inc.*, several appellate courts have addressed the sufficiency of evidence to support mental anguish damages.[69] In *Underwriter's Life Insurance Co. v. Cobb*,[70] the Corpus Christi Court of Appeals upheld the jury's award of $50,000 for mental anguish damages.[71] Evidence to support this award included testimony from the consumer that he experienced "shock" and was "worried sick" and "upset" about the defendant's deceptive conduct.[72] The consumer also testified that his "peace of mind" was "completely destroyed" and that he went from a "happy go lucky" condition to a "sad" condition.[73]

Conversely, in *Town East Ford Sales, Inc. v. Gray*,[74] the Dallas Court of Appeals reversed the jury's award of $5,000 for mental

66. *See id.* (allowed mental anguish recovery without being manifested physically or result of physical injury).

67. *See* North Star Dodge Sales, Inc. v. Luna, 672 S.W.2d 304, 307 (Tex. App.—San Antonio 1984, writ dism'd)(opinion on remand from supreme court to determine factual sufficiency of evidence of mental anguish.)

68. *See id.* at 305 (opinion based on remand from supreme court to address defendant's point of error concerning excessiveness of mental anguish damages). The evidence introduced in *Luna* to support the consumer's mental anguish included migraine headaches which required medical attention, nervousness, depression, anger, anxiety and frustration. *See* North Star Dodge Sales, Inc. v. Luna, 653 S.W.2d 892, 897 (Tex. App.—San Antonio 1983), *aff'd in part, rev'd in part and remanded*, 667 S.W.2d 115 (Tex. 1984).

69. *See, e.g.*, Underwriters Life Ins. Co. v. Cobb, 746 S.W.2d 810, 819 (Tex. App.—Corpus Christi 1988, no writ)(court considered various testimony and decided it was sufficient and not excessive); Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 803-04 (Tex. App.—Dallas 1987, no writ)(mental anguish not recoverable since evidence established only worry, anger, and disappointment); Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 793-94 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)(court considered evidence and held sufficient to award mental anguish since not mere worry, anger, or anxiety).

70. 746 S.W.2d 810 (Tex. App.—Corpus Christi 1988, no writ).

71. *See id.* at 819.

72. *Id.*

73. *Id.*

74. 730 S.W.2d 796 (Tex. App.—Dallas 1987, no writ).

anguish damages because no evidence was presented to support the award.[75] The plaintiff urged on appeal that the testimony that he had been anguished, felt a continuing strain because of the lack of confidence in his vehicle's brakes, and was frustrated with the unsafety of his vehicle was sufficient to support his claim for mental anguish damages.[76] The Dallas court, however, rejected the plaintiff's argument and held that the plaintiff's testimony amounted to "no more than mere worry, anger, resentment, and disappointment" and, therefore, was not evidence of mental anguish.[77]

E. *Other Miscellaneous Damages or Expenses*

Other possible damages recoverable in a DTPA case include personal injuries,[78] loss of credit,[79] loss of earnings,[80] interest charges on indebtedness,[81] expenses of trips made to correct defects in the subject product,[82] and damage to credit reputation.[83] Basically, any type of loss proven to be caused by the defendant's deceptive conduct may

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75. *See id.* at 804.

76. *See id.* at 803.

77. *See id.* at 803-04; *cf.* Miller v. Dickenson, 677 S.W.2d 253, 259-60 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.)(evidence of knowing conduct and that consumers were "embarrassed" and felt "miserable" because of standing sewage in house held sufficient to support award of $2,000 for mental anguish).

78. *See, e.g.*, Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 367-68 (Tex. 1987)(infant's injuries for premature birth recoverable); Mahan Volkswagen, Inc. v. Hall, 648 S.W.2d 324, 332-33 (Tex. App.—Houston [1st Dist.] 1982, no writ)(personal injuries were element of actual damages); Providence Hosp. v. Truly, 611 S.W.2d 127, 136 (Tex. Civ. App.—Waco 1980, writ dism'd)(actual damages due to contaminated syringe recoverable under DTPA).

79. Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 791 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)(loss of credit due to fraud recoverable under DTPA).

80. *See id.* at 793 (lost earnings established with reasonable certainty recoverable under DTPA).

81. *See, e.g.*, Smith v. Baldwin, 611 S.W.2d 611, 617 (Tex. 1980)(builder's failure to pay interim interest included within DTPA damages); Kold-Serve Corp. v. Ward, 736 S.W.2d 750, 755 (Tex. App.—Corpus Christi 1987, writ dism'd)(interest on purchase price allowed under DTPA); Lone Star Ford, Inc. v. McGlashan, 681 S.W.2d 720, 725 (Tex. App.—Houston [1st Dist.] 1984, no writ)(interest as part of actual damages).

82. *See* Manufactured Housing Management v. Tubb, 643 S.W.2d 483, 487 (Tex. App.—Waco 1982, no writ)(if plaintiff was consumer court would have allowed trip expenses); Dillon v. Troublefield, 601 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1980, no writ)(travel expenses incurred while product being repaired was recoverable).

83. Roberts v. U.S. Home Corp., 694 S.W.2d 129, 134 (Tex. App.—San Antonio 1985, no writ)(court considers damages for destruction of credit reputation); Duval County Ranch Co. v. Wooldridge, 674 S.W.2d 332, 335 (Tex. App.—Austin 1984, no writ)(business and credit injuries recoverable in fraud case).

arguably be recovered in a DTPA case,[84] as long as the loss is not speculative or conjectural.[85]

V. Expenses or Costs Must be Reasonable and Necessary

The evidentiary requirements for recovery of expenses or costs of repairs in a DTPA case are the same as in other cases where such damages are recoverable.[86] A consumer seeking recovery for expenses or costs of repairs must prove that the expenses or costs were reasonable and necessary.[87] It is not sufficient to simply prove that the expenses were paid.[88]

The Texas Supreme Court recently confronted this issue in *Jacobs v. Danny Darby Real Estate, Inc.*[89] In *Jacobs*, the court of appeals reversed the trial court's award of damages for the plaintiff's out-of-pocket expenses, holding that the plaintiff "offered no evidence that his expenses were reasonable and necessary."[90] The supreme court reversed, holding that there was some evidence that the expenses were "reasonable and necessary."[91]

VI. Orders to Restore Money or Property

Section 17.50(b)(3) provides that a successful consumer may seek orders necessary to restore "any money or property, real or personal, which may have been acquired in violation" of the DTPA.[92] There are a number of unresolved issues concerning a consumer's entitlement to restoration of consideration paid.

One unresolved question is whether a consumer is required only to

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84. *See* Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985)(damages recoverable in DTPA case determined by total loss sustained as result of deceptive trade practice).

85. *See Roberts*, 694 S.W.2d at 135.

86. Oakes v. Guerra, 603 S.W.2d 371, 373 (Tex. Civ. App.—Amarillo 1980, no writ).

87. *Id.*

88. *See* Ashley v. Bizzell, 694 S.W.2d 349, 354 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.)(citing *Truck Farm, Inc. v. Allen*, 608 S.W.2d 296, 297 (Tex. Civ. App.—Dallas 1980, no writ)); Gatx Tank Erection Corp. v. Tesoro Petroleum Corp., 693 S.W.2d 617, 619 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.)(payment as only proof of cost of repairs insufficient to show reasonableness); *Oakes*, 603 S.W.2d at 373 (no evidence to support payment for services as reasonable).

89. 750 S.W.2d 174 (Tex. 1988).

90. *See id.* at 175.

91. *See id.* at 176.

92. Tex. Bus. & Com. Code Ann. § 17.50(b)(3) (Vernon 1987).

prove a DTPA violation[93] or if the consumer must also satisfy the requirements of the Uniform Commercial Code for revocation of acceptance.[94] In *United Postage Corp. v. Kammeyer*,[95] the consumer sued United Postage for violating several of the "laundry list" subdivisions of the DTPA.[96] The Dallas Court of Civil Appeals awarded restoration of the purchase price under section 17.50(b)(3) solely on the basis of the laundry list violation.[97]

Yet in *Freeman Oldsmobile Mazda Corp. v. Pinson*,[98] the consumer sued Freeman Oldsmobile under the DTPA to rescind his purchase of a vehicle because of certain defects.[99] The court denied the consumer's request for rescission because the consumer did not satisfy the requirements governing rescission and revocation of acceptance set forth in sections 2.711 and 2.608 of the Uniform Commercial Code.[100] Specifically, the court found that the consumer failed to plead and prove that the nonconformity of the vehicle substantially impaired the value of the vehicle to him.[101]

Another unresolved question is whether the DTPA remedies for

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93. *Id.* § 17.50(a). Section 17.50(a) provides:

(a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter;

(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 Article 21.21, Texas Insurance Code . . . .

Id.

94. *Id.* § 2.608 (Tex. UCC)(Vernon 1968). Section 2.608 provides:

(a) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him . . . .

(b) Revocation of acceptance must occur within a reasonable time . . . and before any substantial change in condition of the goods which is not caused by their own defects . . . .

Id.

95. 581 S.W.2d 716 (Tex. Civ. App.—Dallas 1979, no writ).

96. *Id.* at 718.

97. *See id.* at 722-23. In *Burnett v. James*, the Dallas appellate court denied the consumer's decree of rescission because it had not been specifically prayed for. Burnett v. James, 564 S.W.2d 407, 409 (Tex. Civ. App.—Dallas 1978, writ dism'd). It appears that the court may have allowed rescission based solely on a DTPA violation had it been specifically prayed for by the consumer. *See id.*

98. 580 S.W.2d 112 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

99. *Id.* at 112.

100. *See id.* at 114.

101. *Id.*

restoration of consideration and treble damages are mutually exclusive. In *Smith v. Kinslow*,[102] the Dallas Court of Civil Appeals held that the remedies "are mutually exclusive, since one is based on recovery of the benefits under the contract and the other on avoidance of the contract."[103] Consequently, the Dallas court held that the consumer was allowed to "recover three times his actual damages under subdivision (1) or restoration of the consideration paid under subdivision (3), but not both."[104] Conversely, the Corpus Christi Court of Appeals in *Whirlpool Corp. v. Texical, Inc.*[105] held that the trial court's award of partial rescission and treble damages were not incompatible.[106] The *Whirlpool* case may have been a unique fact situation because the Corpus Christi court recently held in *Texas Cookie Co. v. Hendricks & Peralta, Inc.*[107] that it was error for the trial court to award the consumer treble damages and restoration of consideration paid.[108]

VII. DISCRETIONARY DAMAGES

A successful consumer under the DTPA is entitled to recover two times the portion of actual damages that does not exceed one thousand dollars.[109] The consumer may also recover discretionary damages not to exceed three times the amount of actual damages.[110] Discretionary damages are conditioned on the trier of fact finding that the defendant's violation of the DTPA was committed knowingly.[111]

Prior to 1979, a successful DTPA consumer was entitled to recover mandatory treble damages if the trier of fact found the defendant's conduct was committed knowingly.[112] The 1979 amendments to the

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102. 598 S.W.2d 910 (Tex. Civ. App.—Dallas 1980, no writ).

103. *See id.* at 915.

104. *See id.*; *see also* David McDavid Pontiac, Inc. v. Nix, 681 S.W.2d 831, 835 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

105. 649 S.W.2d 55 (Tex. App.—Corpus Christi 1982, no writ).

106. *Id.* at 57.

107. 747 S.W.2d 873 (Tex. App.—Corpus Christi 1988, writ denied).

108. *Id.* at 879. In reaching its decision, the Corpus Christi court relied on *Smith v. Kinslow*. *See id.* (citing *Smith v. Kinslow*, 598 S.W.2d 910 (Tex. Civ. App.—Dallas 1980, no writ)). The court also cited *Whirlpool* in support of its holding. *See id.* (citing *Whirlpool Corp. v. Texical, Inc.*, 649 S.W.2d 55 (Tex. App.—Corpus Christi 1982, no writ)).

109. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987).

110. *Id.*

111. *Id.*; *see also* Martin v. McKee Realtors, Inc., 663 S.W.2d 446, 447 (Tex. 1984)(court explains section 17.50 damages).

112. *See Martin*, 663 S.W.2d at 447-48.

DTPA changed the mandatory provision to a discretionary provision.[113] The 1979 amendments caused confusion regarding the maximum amount of discretionary damages that could be awarded.[114] The Texas Supreme Court resolved the confusion in *Jim Walter Homes, Inc. v. Valencia*.[115] The supreme court held that maximum DTPA damages should be calculated on the following basis:[116]

(1)	three times the first $1,000 of actual damages	$ 3,000
(2)	not more than three times the amount of actual damages in excess of $1,000 ($11,682 x 3)	$35,046

The court reasoned that the 1979 amendments were designed to preserve mandatory treble damage recovery on claims under a thousand dollars, eliminate additional automatic trebling in cases of innocent misrepresentations, and permit trebling for knowing violations in the discretion of the trier of fact.[117]

VIII. ATTORNEYS' FEES

The DTPA also permits a successful consumer to recover court costs and "reasonable and necessary attorneys' fees" incurred in prosecuting his claim.[118] A consumer is entitled to recover attorneys' fees even if the consumer's claim is entirely offset by a claim of the opposing party.[119]

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113. *See id.* at 448.

114. *See* Jasso v. Duron, 681 S.W.2d 279, 280-81 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). The trial court in *Jasso* added discretionary damages of three times actual damages to the actual damages found by the jury. *Id.* at 280. The Houston Court of Appeals held that the trial court's calculation resulted in an award of four times actual damages in excess of $1,000. *Id.* at 281. The Houston court, therefore, modified the trial court's award, holding that the DTPA prohibited a total award of quadruple actual damages above $1,000. *Id.* at 281-82.

115. 690 S.W.2d 239 (Tex. 1985).

116. *Id.* at 241.

117. *Id.*

118. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987).

119. *See* McKinley v. Drozd, 685 S.W.2d 7, 9 (Tex. 1985). In *McKinley*, the consumer's DTPA counterclaim was more than offset by the unpaid balance the consumer owed the building contractor. *See id.* at 8. The contractor argued on appeal that a net recovery should be required for an award of attorneys' fees. *See id.* at 9. The supreme court rejected the contractor's argument and ruled that attorneys' fees are awarded to all prevailing consumers because

Expert testimony is required to establish that the attorneys' fees sought by the consumer were reasonable and necessary.[120] The consumer must designate his expert witness concerning attorneys' fees in response to properly worded interrogatories even if the consumer's own attorney is expected to testify regarding fees.[121] If the consumer fails to do so, exclusion of any evidence regarding attorneys' fees is automatic unless the consumer shows good cause for admission of the evidence.[122] Proof showing lack of surprise or prejudice to the opponent is irrelevant to a showing or demonstration of good cause.[123]

IX. PREJUDGMENT INTEREST

Successful consumers are also entitled to recover prejudgment interest.[124] There is a conflict, however, among the appellate courts as to whether prejudgment interest should be recognized as actual damages for the purpose of trebling.[125] In *Indust-Ri-Chem Laboratory v. Par-Pak Co.*,[126] the Dallas Court of Appeals held that because prejudgment interest is within the DTPA and common-law meaning of "actual damages," it should be trebled.[127] The Houston Court of Appeals, however, has held in *Rotello v. Ring Around Products, Inc.*[128] and *Precision Homes, Inc. v. Cooper*[129] that prejudgment interest dam-

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of the need to provide an economical remedy to victims of deceptive practices. *See id.* at 10; *see also* Matthews v. Candlewood Builders, Inc., 685 S.W.2d 649, 650 (Tex. 1985).

120. *See* E.F. Hutton & Co., Inc. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987).

121. *See id.* Recently, the Dallas Court of Appeals held that the provision of chapter 38 of the Texas Civil Practice and Remedies Code which provides a presumption for the reasonableness of attorney's fees is not applicable to claims for attorney's fees under the DTPA. Smith v. Smith, No. 05-87-00612-CV (Tex. App.—Dallas, July 21, 1988, no writ)(not yet reported).

122. *See Youngblood*, 741 S.W.2d at 364.

123. *See id.*; Investors, Inc. v. Hadley, 738 S.W.2d 737, 742 (Tex. App.—Austin 1987, writ denied).

124. *See* Precision Homes, Inc. v. Cooper, 671 S.W.2d 924, 930 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). A DTPA plaintiff is not, however, entitled to pre-judgment interest on discretionary damages and attorneys' fees. *See* McCann v. Brown, 725 S.W.2d 822, 826 (Tex. App.—Fort Worth 1987, no writ).

125. *Compare* Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., Inc., 602 S.W.2d 282, 298 (Tex. App.—Dallas 1984, no writ)(recognizing prejudgment interest as actual damages) *with* Rotello v. Ring Around Products, Inc., 614 S.W.2d 455, 463 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)(refusing to recognize prejudgment interest as actual damages).

126. 602 S.W.2d 282 (Tex. App.—Dallas 1984, no writ).

127. *Id.* at 298.

128. 614 S.W.2d 455, 463 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

129. 671 S.W.2d 924, 931 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

ages should not be trebled.

X. DEFENSIVE CONSIDERATIONS

A. *Offsets*

A defendant in a DTPA case may be entitled to an offset or credit against a consumer's damages if there is an outstanding indebtedness owed by the consumer.[130] The right of offset is an affirmative defense which must be pleaded and proven by the parties seeking the offset.[131] Allowable offsets are subtracted from the consumer's actual damages before trebling, necessarily reducing the amount of damages subject to trebling.[132]

B. *Mitigation of Damages*

Under common law, an injured party was required to use reasonable efforts to mitigate his damages.[133] Since the term "actual damages" under the DTPA has been interpreted to mean those damages recoverable at common law,[134] it logically follows that a consumer seeking damages under the DTPA must comply with the duty to mitigate or minimize his loss under common law.[135]

Depending upon the facts of the case, this duty or obligation to mitigate damages may benefit the consumer or the defendant. The benefit to the consumer is that he may be entitled to recover the reasonable and necessary expenses he incurs in mitigating his economic

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130. *See* Smith v. Baldwin, 611 S.W.2d 611, 617 (Tex. 1980)(reasonable rental value of house as offset).

131. *See* Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 936 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).

132. *See Smith*, 611 S.W.2d at 617; Streeter v. Thompson, 751 S.W.2d 329, 331 (Tex. App.—Fort Worth 1988, no writ).

133. *See* Texas & Pac. Ry. Co. v. Mercer, 127 Tex. 220, 225, 90 S.W.2d 557, 560 (Tex. Comm'n App. 1936, opinion adopted).

134. *See Brown*, 601 S.W.2d at 939.

135. *See* Great State Petroleum v. Arrow Rig Service, 706 S.W.2d 803, 807 (Tex. App.—Fort Worth), *rev'd on other grounds on reh.*, 714 S.W.2d 429 (Tex. App.—Fort Worth 1986, no writ); *see also* Alexander & Alexander of Texas, Inc. v. Bacchus Indus., Inc., 754 S.W.2d 252, 253 (Tex. App.—El Paso 1988, no writ)(trial court erred in failing to instruct jury on mitigation in suit under article 21.21 of Insurance Code); Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 806 (Tex. App.—Dallas 1987, no writ)(injured party has duty to minimize loss in DTPA case); Cocke v. White, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)(court recognized defense of mitigation in DTPA case but affirmed trial court's refusal to submit instruction regarding mitigation because of no evidence).

loss.[136] These expenses are recoverable under the DTPA as actual damages.[137] For example, a consumer may be faced with a choice between repairing or replacing damaged property. The consumer may be entitled to recover the cost of replacement if his decision to replace is reasonable.[138] Factors considered in determining the reasonableness of the consumer's decision include the cost of replacement versus repair,[139] the projected "down time" associated with repair versus replacement, and the possible loss of business activity.[140]

The benefit to the defendant is realized in two situations. First, a defendant may introduce evidence that the consumer *has* mitigated damages to rebut the damages sought by the consumer. Second, a defendant may introduce evidence that the consumer *has failed* to mitigate damages.[141] In that situation, the defendant would not be responsible for those damages caused by the consumer's failure to mitigate or minimize his loss.

Although it is unclear in a DTPA case whether the failure to mitigate damages should be specially pleaded, the better practice is for a defendant to plead it.[142] It is clear that the burden is on the defendant to prove the lack of diligence on the part of the consumer and the amount damages were increased as a result of the consumer's failure to minimize or mitigate damages.[143] If the defendant meets his bur-

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136. *See* Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 924 (Tex. App.—Waco 1985, writ dism'd).

137. *See id.*

138. *See, e.g., Gray*, 730 S.W.2d at 804 (purchase of replacement vehicle); *Hycel*, 690 S.W.2d at 924 (replacement of medical equipment reasonable).

139. Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 804 (Tex. App.—Dallas 1987, no writ).

140. Great State Petroleum v. Arrow Rig Service, 706 S.W.2d 803, 809 (Tex. App.—Fort Worth), *rev'd on other grounds on reh.*, 714 S.W.2d 429 (Tex. App.—Fort Worth 1986, no writ).

141. *See Gray*, 730 S.W.2d at 806 (no evidence presented showing failure to mitigate); Cocke v. White, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)(defendant has burden of showing lack of diligence in failure to mitigate).

142. *See* Union Carbide Corp. v. Gayton, 486 S.W.2d 865, 870 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.)(in breach of contract case, defendant must specifically plead plaintiff's failure to mitigate damages). *But see* Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444, 447-48 (Tex. 1967)(in case for personal injuries, mitigation of damages not affirmative defense which must be specifically pleaded).

143. *See, e.g.*, Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 806 (Tex. App.—Dallas 1987, no writ)(no evidence submitted to show failure to mitigate); *Cocke*, 697 S.W.2d at 744 (no evidence showing reduction in damages); Copenhaver v. Berryman, 602 S.W.2d 540, 544 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)(party who breached contract has burden of proof).

den of proof, the jury should be instructed regarding the plaintiff's duty to mitigate.[144]

XI. CONCLUSION

The starting point in understanding damages in a DTPA case is the principle that the consumer is entitled to recover the greatest amount of damages actually caused by the deceptive conduct. This article has highlighted several types of damages which have been approved expressly or by implication by the courts. It is by no means an exhaustive list. Although a consumer should seek any type of damage that would permit the greatest recovery, the consumer should be careful not to weaken his or her case by appearing greedy. For example, a jury may feel that a consumer is trying to capitalize on misfortune if the consumer seeks an exorbitant amount for mental anguish damages and the proof at trial does not establish a solid case for such a reward.

144. *See* Alexander & Alexander of Texas, Inc. v. Bacchus Indus., Inc., 754 S.W.2d 252, 253 (Tex. App.—El Paso 1988, no writ); *see also* Cook Consultants, Inc. v. Larson, 700 S.W.2d 231, 238 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). The following instruction was approved by the Dallas court in *Cook Consultants, Inc.*:

> You are instructed that a Plaintiff must exercise reasonable care to lessen or mitigate the damages or losses flowing from an event, if any. A Plaintiff's damage or losses may not be proximately caused by another person's conduct to the extent, if any, a Plaintiff fails to exercise such reasonable care.

Id.