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## DTPA in the Courts: Two Empirical Studies and a Proposal for Change.

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## **DTPA IN THE COURTS: TWO EMPIRICAL STUDIES AND A PROPOSAL FOR CHANGE**

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## I. INTRODUCTION

We represent both plaintiffs and defendants in Texas. The Deceptive Trade Practices-Consumer Protection Act ("DTPA" or the "Act") has become a commonplace tool in both consumer and commercial litigation. We conducted two empirical studies of DTPA litigation in Harris County because the DTPA has become controversial. One analyzes approximately 700 DTPA cases filed in 1985 and 1986. The second analyzes all trials conducted in the Harris County District Courts in 1986 and 1987.

Part I of this report gives an overview of the DTPA. Parts II and III present the results of the two studies. Based on the litigation patterns we observed, we propose several amendments in Part IV that we believe will minimize abusive use of the Act, while protecting consumers who are unable to enforce their rights without this statute.

### A. *Summary of Conclusions of Research*

Our research confirms that the DTPA has a major impact on consumer and commercial litigation. Much of this corresponds with what the statute was intended to do: create remedies for true personal

or household consumer disputes. However, some of the effects cannot be justified as consumer protection. While most DTPA litigation involves small claims pursued by individuals concerning personal or household-related transactions, a substantial number of DTPA claims involve extremely large dollar amounts. Many large DTPA claims involve businesses suing other businesses. This commercial litigation accounts for over 25% of all DTPA lawsuits.<sup>1</sup>

Our data includes cases filed in the first half of each of 1985 and 1986, as well as all cases tried in Harris County during 1986 and 1987.<sup>2</sup> Our research reveals that most individual litigants seek and recover less than \$25,000 in actual damages.<sup>3</sup> For these cases, treble damages, shifting of attorneys' fees, and relaxed causation standards serve their intended purpose. Our data also indicates, however, that the DTPA is used as a weapon in large claim cases and purely commercial litigation. Here, its special pro-plaintiff advantages are not appropriate, but remedies such as treble damages and attorneys' fee awards occur in these large cases, as well as in smaller claims.

#### B. *Summary of Proposed Amendments*

While the DTPA serves laudable purposes, we believe that it was not originally intended to be—and should not be—the basis for broad alteration of contract and tort litigation generally. The DTPA is unique. The act expands businesses' substantive liability and allows plaintiffs to recover additional damages in many cases where such recoveries would not be available under traditional contract or tort law. It imposes a lower standard of causation for proof of liability and damages than in traditional claims such as breach of contract, negligence, fraud or breach of warranty. It allocates the cost of successful plaintiffs' attorneys' fees to defendants without limitation on amount or correlation to damages proven. The DTPA thus creates a serious risk of liability and enhanced damages for businesses in Texas. Some of this is an intended deterrent effect for the DTPA. However, the DTPA reaches too far, unfairly imposing additional costs on doing business in Texas and creating disincentives to new business in this State. We believe that the over-reach of the DTPA can be remedied

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1. See Table 1.

2. Our studies define "business" plaintiffs as corporations, partnerships, or sole proprietorships (d/b/a/'s). We refer to a case with at least one business plaintiff as a "business" case.

3. See Table 3.

without adverse impact on its benefits in true consumer litigation. To achieve this, we recommend the following:

- (1) The statute should not apply to claims where plaintiffs seek more than \$200,000. Damages in excess of \$200,000 should be awarded only under traditional liability theories.
- (2) Punitive damages against a defendant should be awarded only on the first \$100,000 in actual damages and only on a finding that defendant's wrongful conduct was committed "knowingly."
- (3) The definition of "knowingly" should be clarified to state that treble damages are appropriate only if defendant's wrongdoing was intentional.
- (4) The period within which defendants may make an offer of settlement should be expanded.

## II. OBJECTIVES AND APPROACH OF THE DTPA

### A. *The DTPA in the Legislature*

#### 1. The Perceived Problems

"Consumer" disputes entail relatively small claims and stem from transactions in which an individual (consumer) had unequal bargaining power or knowledge. In such circumstances, deceptive practices will often go unremedied. In Texas before 1973, only the Attorney General had authority to bring suit for violations of the deceptive practice—consumer protection laws.<sup>4</sup> This was an inadequate remedy system for consumers.

John L. Hill, who as Attorney General of Texas spearheaded many consumer reforms, described the DTPA as a "landmark piece of legislation."<sup>5</sup> He described the motivation behind the DTPA in terms of making suits over small claims affordable:

[In] many instances, justice was not being afforded our citizens purely because of the economic imbalance between the costs of litigation and the generally small amounts in controversy . . . . I saw many types of injuries and damage that could befall a consumer which simply could not be redressed in the courts due to the economic reality of spending more money on court costs and attorney's fees than could ultimately be

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4. Deceptive Trade Practices-Consumer Protection Act, ch. 274, 1967 Tex. Gen. Laws 658, 659 repealed by Deceptive Trade Practices-Consumer Protection Act, ch. 143, § 3, 1973 Tex. Gen. Laws 322, 342.

5. D. BRAGG, P. MAXWELL, & J. LONGLEY, TEXAS CONSUMER LITIGATION, iii (2d ed. 1983) (Hill's forward).

recovered from the defendant wrongdoer. Thus, after my election in 1973, I requested members of my staff . . . to help draft a model consumer protection statute which would be based upon the principle of fairness, but would have the effect of making deception, breach of warranty and unconscionable conduct unprofitable for those who would deal in such undesirable practices.<sup>6</sup>

David Bragg, Philip Maxwell, and Joe Longley, authors of *Texas Consumer Litigation*,<sup>7</sup> reinforce the small consumer focus of the DTPA in the Introduction to their first edition:

The problem was that the remedies provided at common law were so inadequate as to render virtually meaningless what rights a consumer did have . . . . In a nutshell, common law fraud and breach of warranty were available for consumers to use as a cause of action, but were accompanied with a heavy burden of proof and centuries of defenses which inhibited their use. Moreover, many cases involved only small amounts of money which a lawyer could not economically pursue.<sup>8</sup>

Professor Richard Alderman of the University of Houston Law Center characterizes the purposes of the DTPA similarly:

Traditionally, 'consumers' in Texas were virtually defenseless when it came to dealing with unscrupulous, or simply careless, merchants. The available remedies . . . all had limited applicability, and were difficult to establish. The ancient maxim 'caveat emptor' reigned supreme . . . . But in 1973 the Texas Legislature changed all this. With the enactment of a legislative reform package 'caveat emptor' was replaced with 'caveat venditor.'<sup>9</sup>

In hearings in 1973, the Texas Legislature heard testimony on problems faced by consumers with small claims. The Legislature responded by enacting the DTPA, the Debt Collection Practices Act, various landlord/tenant laws, and the Home Solicitations Transactions Act (allowing consumers to cancel orders, among other protections).

6. *Id.* (emphasis in original).

7. D. BRAGG, P. MAXELL & J. LONGLEY, *TEXAS CONSUMER LITIGATION* (1st ed. 1983). This is a treatise on the DTPA, described by its authors as "a how-to-do-it" resource to assist attorneys who occasionally need to give advice about a "pocketbook injury." *Id.* at vii.

8. *Id.*

9. R. ALDERMAN, *TEXAS DECEPTIVE TRADE PRACTICES, CASES AND MATERIALS* 1 (1988).

## 2. Initial DTPA Provisions

As enacted in 1973, the DTPA provided that “consumers,” defined as “individuals,”<sup>10</sup> could institute private suits to remedy deceptive trade practices and could sue for treble damages, court costs and attorneys’ fees when “adversely affected” by a deceptive trade practice, a breach of warranty, unconscionable conduct or a violation of article 21.21 of the Texas Insurance Code. The new law declared unlawful a “laundry list” of specific acts defined as “deceptive” as well as any other “deceptive act or practice.”<sup>11</sup> Some of the acts specified in the laundry list required that conduct be committed “knowingly.”<sup>12</sup>

The teeth of the new law were in requiring defendants to pay attorneys’ fees to successful plaintiffs, creating a looser causation standard (“adversely affected,” rather than proximate cause) and establishing an automatic trebling of “actual damages” for any DTPA violation, irrespective of whether the violation had been committed knowingly. Most typical consumer transactions were covered, including the purchase of “‘goods’ . . . bought for use”<sup>13</sup> and contracts for “‘services’ . . . for other than commercial or business use.”<sup>14</sup>

These provisions protected individual consumers by inducing attorneys to undertake consumer representation that previously had been considered uneconomical. The losing defendant would pay the consumer’s attorneys’ fees, and the small claim recovery would be enhanced by trebling. The DTPA enabled consumers to defeat any incentive for retail sellers or service providers to take advantage of the fact that most consumers could not afford large litigation expenses. DTPA trebling of damages was also intended to punish deceptive merchants.

## 3. DTPA Amendments

During the fifteen years since its enactment, the Legislature has amended the Act frequently. The initial amendments expanded the DTPA, but later actions reduced its scope.

10. Deceptive Trade Practices-Consumer Protection Act, ch. 143, 1973 Tex. Gen. Laws 322, 323.

11. *Id.* at 323-24.

12. *Id.* “Knowingly” was defined as: “actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.” *Id.*

13. *Id.* (emphasis added).

14. *Id.* (emphasis added).

In 1975, the definition of “consumer” was expanded to include partnerships and corporations<sup>15</sup> based on the notion that they, too, needed protection against deceptive practices in small transactions. At that time, the term “goods” was also expanded to include real property,<sup>16</sup> thus bringing a major consumer transaction within the ambit of the DTPA.

In 1977, governmental entities were brought within the definition of consumer.<sup>17</sup> Likewise, the term “services” was expanded to cover services for commercial or business use.<sup>18</sup> “Unconscionability” was defined to mean that the seller “(A) takes advantage of the lack of knowledge, ability, experience . . . of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid . . . .”<sup>19</sup> Provisions to protect defendants were also enacted for balance, and a bona fide error defense was created. Additionally, a 30-day pre-suit notice and offer of settlement provision was enacted for all claims. The 1977 amendments also gave defendants an opportunity to cure<sup>20</sup> and indemnity rights.<sup>21</sup>

In 1979, the Legislature made additional changes. The DTPA was amended to clarify that plaintiffs could not obtain duplicative recoveries.<sup>22</sup> The causation standards were changed to require that the violation be “a producing cause of actual damages.”<sup>23</sup> The amendments also changed the treble damages rules. Trebling became automatic for only the first \$1,000 of actual damages, while the trier of fact retained discretion to award treble damages for the remaining amount of actual damages if the “conduct of the defendant was committed knowingly.”<sup>24</sup> The definition of the term “knowingly” was amended to include:

actual awareness of the falsity, deception, or unfairness of the act or

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15. Deceptive Trade Practices-Consumer Protection Act, ch. 62, 1975 Tex. Gen. Laws 149, 149 (definitions, defenses to class actions).

16. *Id.*

17. Deceptive Trade Practices-Consumer Protection Act, ch. 216, 1977 Tex. Gen. Laws 600, 600 (definitions, relief, defenses, legislative intent).

18. *Id.*

19. *Id.*

20. *Id.*

21. 1977 Tex. Gen. Laws at 600.

22. Deceptive Trade Practices-Consumer Protection Act, ch. 603, 1979 Tex. Gen. Laws 1327, 1327.

23. *Id.*

24. *Id.* at 1331-32.



practice giving rise to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50 [concerning breach of warranty], actual awareness of the act or practice constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.<sup>25</sup>

These changes indicate that the Legislature perceived treble damage awards as too severe and too broadly available in light of the generally expansive scope of DTPA claims. The reference to warranty claims apparently was also an effort to assist in analyzing treble damages requests in such claims.<sup>26</sup> Finally, to assist in balancing the effect of the Act, the 1979 amendments included additional requirements in the notice and offer of settlement provisions.<sup>27</sup> At that time, a new approach to defenses to claims was adopted. The Act's bona fide error defense was eliminated.<sup>28</sup> Instead, defendants relying on written information provided by a third party were given protection.<sup>29</sup>

In 1981, reacting to the negative impact of the DTPA on businesses, the Legislature again limited the Act. The 1981 amendments provided that "consumers" with \$25 million in assets could voluntarily waive rights under the DTPA.<sup>30</sup> In 1983, the right to waive the DTPA was expanded to businesses with assets of \$5 million or more.<sup>31</sup> Simultaneously, the definition of "consumer" was limited to exclude businesses with over \$25 million in assets,<sup>32</sup> again demonstrating the Legislature's intention to distinguish between big business and true consumers. The 1985 and 1987 DTPA amendments are not material to this report.

As this brief history demonstrates, the scope and terms of the

25. *Id.* at 1327. Compare Deceptive Trade Practices-Consumer Protection Act, ch. 143, 1973 Tex. Gen. Laws 322, 323 with Deceptive Trade Practices-Consumer Protection Act, ch. 603, 1979 Tex. Gen. Laws 1327, 1327.

26. This attempt may have gone too far, however, since certain courts have interpreted the act to allow trebling on a showing of only the commission of the act constituting the breach of warranty without any finding of knowledge of the wrongfulness of the conduct. See *infra* notes 140-150 and accompanying text.

27. 1979 Tex. Gen. Laws at 1330-31.

28. *Id.* at 1331-32.

29. *Id.*

30. Deceptive Trade Practices-Consumer Protection Act, ch. 307, 1981 Tex. Gen. Laws 863, 863-64 (waiver of provisions).

31. Deceptive Trade Practices-Consumer Protection Act, ch. 883, 1983 Tex. Gen. Laws 4943, 4943 (business consumers waiver or exclusion).

32. *Id.* at 4943-44.

DTPA have undergone biennial revision since its inception. Twin goals dominate this process of adjustment. One is to develop and maintain an effective remedy for consumers with limited assets to pursue small claims. The parallel goal entails reducing how far the Act infringes on large value or commercial litigation where the need for a special remedy fades and more traditional tort and contract remedies function adequately.

### B. *The DTPA in the Courts*

Based on the general language of the Act, courts also have expanded the reach of the DTPA. The Act as presently interpreted by the Texas courts generally favors the plaintiff. There is no requirement that the plaintiff prove either reliance per se on defendant's wrongful conduct<sup>33</sup> or, in most instances, intent by defendant to violate the Act.<sup>34</sup> Most common law defenses, such as the merger doctrine and parol evidence rule, are inapplicable to a DTPA claim.<sup>35</sup> Common law waiver and estoppel rules are also not applicable.<sup>36</sup> Further, notice will not be imputed to the plaintiff as a defense to a DTPA claim, even if the information in issue was confined in documents which were filed in the deed records.<sup>37</sup> Additionally, the consumer need not give value for the goods or services acquired,<sup>38</sup> and no privity between the consumer and the defendant is necessary for liability.<sup>39</sup>

The DTPA's reach also has been materially broadened through court expansion of the scope of implied warranties. Implied warranties of "good and workmanlike manner" are now interpreted to include repairs or modifications made by professionals or service providers to "existing tangible goods or property," even if the services

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33. *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985).

34. *Chastain v. Koonce*, 700 S.W.2d 679, 583 (Tex. 1985).

35. *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988); *Weitzel*, 691 S.W.2d at 599-600; *Tidelands Life Ins. Co. v. Harris*, 675 S.W.2d 224, 226 (Tex. App.—Corpus Christi 1984, writ ref'd. n.r.e.).

36. *Kennemore v. Bennett*, 755 S.W.2d 89, 90-91 (Tex. 1988).

37. *Ojeda de Toca v. Wise*, 748 S.W.2d 449, 451 (Tex. 1988).

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

39. *Cameron v. Terrell, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981); *see also* *Sherman Simon Enters. v. Lorac Serv. Corp.*, 724 S.W.2d, 13, 15-16 (Tex. 1987); *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 566-67 (Tex. 1984).

involve the exercise of discretion and judgment.<sup>40</sup> Also, the landlords' warranty of suitability of rental space for a particular purpose has been extended to commercial tenants.<sup>41</sup>

The DTPA creates an affirmative cause of action for "unconscionable" conduct.<sup>42</sup> Under this provision, sellers have been held to be guarantors of purchasers' benefit of the bargain as anticipated by purchasers at the time of the transaction, regardless of inherent risks that were or should have been known to the parties originally.<sup>43</sup>

Liberal construction of the DTPA not only enhances its role in small claim cases, but also affects large claim litigation, where it makes less sense. For instance, the term "actual damages" has been interpreted to extend beyond out-of-pocket costs, covering a reduction in market value, lost profits, and mental anguish (if the violation is knowingly committed).<sup>44</sup> These types of loss are usually not recoverable in typical contract or tort cases and by their very nature are usually at issue only in large claim cases.

The trebling of damages is a serious threat that exists even if the defendant did not intend to deceive the plaintiff. The DTPA is a strict liability statute: under most DTPA provisions, if a statement turns out later to have been incorrect, liability may result regardless of the defendant's knowledge or intent. Finally, unless the DTPA's indemnity provision<sup>45</sup> applies, there is no means of allocating comparative responsibility between a reckless or negligent plaintiff and defendant at least under the pre-1989 Versions of the Act.<sup>46</sup> DTPA defendants bear full responsibility for the plaintiff's injuries, even when only partly at fault and even if the plaintiff has acted unreasonably or recklessly in entering into the transaction.

40. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987); *see also Archibald v. Act III Arabians*, 755 S.W.2d 84, 85-87 (Tex. 1988).

41. *Davidow v. Inwood N. Professional Group-Phase I*, 747 S.W.2d 373, 377 (Tex. 1988).

42. *Chastain v. Koonce*, 700 S.W.2d 579, 582-83 (Tex. 1985).

43. *Vick v. George*, 671 S.W.2d 541, 550-51 (Tex. Civ. App.—San Antonio 1983), *rev'd in part on Rule 434 grounds*, 686 S.W.2d 99, 99 (Tex. 1984)(investors in gas wells sued because they did not profit on investment).

44. *Ludt v. McCollum*, 762 S.W.2d 575, 576 (Tex. 1988); *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984); *Precision Homes, Inc. v. Cooper*, 671 S.W.2d 924, 928 (Tex. Civ. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

45. TEX. BUS. & COMM. CODE ANN. § 17.55 (Vernon 1987).

46. *See Montford, Barber & Duncan*, 1989 *Texas DTPA Reform: Closing the DTPA Loop-hole in the 1987 Tort Reform Laws And The Ongoing Quest For Fairer DTPA Laws*, 21 *St. Mary's L.J.* 525, 539-42 (1990) (discussing limited comparative responsibility provisions in the 1989 amendments enacted by the Texas Legislature).

The pro-plaintiff bias in the DTPA is unfair in large cases. There are almost no legal defenses to a DTPA claim. The Legislature constructed the statute this way to assist consumers in small cases. But in large cases clients do not have difficulty obtaining attorneys or in affording litigation. The need for pro-plaintiff provisions, such as enhanced damages and attorneys' fee awards, does not exist in these circumstances. The DTPA becomes an unfair club in classic commercial litigation cases which involve large claims.

### III. THE EMPIRICAL STUDIES

We conducted two empirical studies in Harris County that, when taken together, constitute the most complete analysis of DTPA litigation conducted to date in Texas.

One study (the "Cases Filed Study") is an analysis of 712 cases filed in Harris County District Courts and involved every case we could identify with DTPA claims during January through June in 1985 and the same period in 1986. For lawsuits filed during each period, we attempted to identify a large, representative sampling of cases with at least one DTPA claim.<sup>47</sup> In total we reviewed 2,683 case files and concentrated on 712 cases raising DTPA allegations.<sup>48</sup> Data for each DTPA case in this group were obtained from the court files and from interviews or correspondence with attorneys of record who responded to our inquiries.

The second study (the "Dispositions Study") focuses on cases disposed of by trial, settlement, dismissal or default. We analyzed 201 trials and 151 non-trial dispositions of cases with DTPA claims dur-

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47. To find these cases, we reviewed every case designated by plaintiff's counsel within the categories of "contract," "breach of contract," "agreement" and "damages (other)" for administrative purposes in the Harris County District Courts. The categories of cases reviewed were the same for 1985 and 1986, except that in 1986 we also searched the categories labeled "fraud" for January through June, "personal injury (auto)" for January, and "personal injury (non-auto)" for January. In that three category sample, we found only 3 cases (1%) with DTPA claims out of a total of 242 searched. We also searched the 287 cases found in these three categories among 1987 cases. In that group, we found only 5 cases (1.7%) in which DTPA claims were asserted. After finding so few DTPA cases in such large samples, we decided against searching these three categories for the 1985 cases.

48. Among these also were 60 DTPA cases identified through an analysis of all the cases tried in Harris County District Court in 1986 and 1987 that were filed within the first six months of either 1985 or 1986, but had not surfaced during our initial review of 1985 and 1986 cases. These 60 cases were included in the Dispositions Study described below.

ing 1986 and 1987.<sup>49</sup> This analysis initially used commercial summaries known as the “Blue Sheets” published by Houston Trial Reports. The data for each case included information about the plaintiffs, the defendants, the allegations and the damage awards, if any. Through telephone interviews with at least one attorney of record in each case, we confirmed and, where necessary, revised the information obtained from the Blue Sheet summaries.

In each study, we distinguished between “business” and “individual” plaintiffs. The DTPA defines “consumer” broadly to cover both individuals and businesses. For the purpose of understanding the public’s actual use of the DTPA, however, a more discriminating definition is necessary. We divided the cases under study into two types: (1) “business” cases (cases with at least one corporation, partnership or sole proprietorship as the plaintiff) and (2) “individual” cases (cases in which all plaintiffs were individuals and none were suing under a business, trade or professional name).<sup>50</sup>

#### A. *Nature of the Parties*

Several themes run through both the Cases Filed Study and the Dispositions Study. Perhaps the most important is that while 70% of the cases were brought by individuals,<sup>51</sup> an extensive amount of DTPA litigation was instituted by business plaintiffs. As shown in Table 1 below, both in 1985 and 1986, over 25% of all DTPA cases filed involved at least one business plaintiff. In the Dispositions Study, the business cases also exceeded 21% of the total.<sup>52</sup>

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49. We deleted cases with non-final dispositions, such as mistrials or hung juries.

50. Since we cannot determine from our data whether the transaction that formed the basis of each lawsuit involved solely personal, household or family matters, some cases we classify as “individual cases” may in fact involve business transactions. Similarly, some “business cases” involving small business plaintiffs and small dollar claims may in fact be more akin to traditional “consumer” litigation.

51. See Table 1.

52. See Appendix 26.

TABLE 1: BUSINESS AS COMPARED TO INDIVIDUAL CASES\*  
(Cases Filed Study)

Type of Plaintiffs:	1985	1986
Business	26.9% (82)	28.5% (116)
Individual	73.1% (223)	71.5% (291)
TOTAL	100% (305)	100% (407)

\* The number of cases appears in parentheses. For more detail on this data, see Appendix 1.

DTPA plaintiffs range from individuals to large companies. Businesses that filed suit under the DTPA included small companies such as Sure Load Trailers, Inc., foreign companies like Schahin Cury Eugenhaira E Comercio, LTDA, and large corporations like Atlantic Richfield Co. Other business plaintiffs included Bass & Meineke Group, Houston Lawyer Referral Service, First Federal Savings & Loan - Big Spring, and Geotech Energy Corp.

TABLE 2: ANALYSIS OF DEFENDANTS IN DTPA CASES\*  
(Cases Filed Study)

Type of Plaintiffs:	Bus. Deft.*	Ind. Deft.*	Total
Business	184	14	198
Individual	450	64	514
TOTAL	634	78	712

\* "Bus. Deft." means cases with at least one business defendant. "Ind. Deft." means cases with no business defendants. See Appendix 1 for more detail on this data.

In contrast, almost 90% of all cases were filed against at least one business.<sup>53</sup> Virtually all cases filed by business plaintiffs were commercial disputes, involving business defendants. Of the seven cases filed in 1986 by businesses against individuals, two involved the sale of a business, one involved the individual defendant's disposition of office space, one involved a construction dispute, one involved conveyance of a prefabricated metal building, and one was a compliance

53. See Table 2 and Appendix 1.

action instituted by the State of Texas.<sup>54</sup>

## B. *Cases Filed Study*

### 1. Number of Complaints Filed

While the Cases Filed data indicate that the percentage of business cases was stable from 1985 to 1986,<sup>55</sup> the data also suggest that a major change may have occurred in the use of the Act between 1985 and 1986. The number of filed DTPA cases in our samples increased from 305 during the first 6 months of 1985 to 407 during the same period in 1986.<sup>56</sup> This increase, in conjunction with informal attorney interviews in confirming our data, may indicate a broadbased change in litigation practice, with the DTPA becoming an increasingly commonplace litigation tool.

One can only speculate about the causes of this increase. One explanation could be that the plaintiffs' bar became more familiar with the Act. Alternatively, we may be merely recording a transient change. The absence of 1987-88 data precludes testing either premise.<sup>57</sup> We believe that the change simply manifests an increased awareness of the litigation benefits that DTPA allegations provide to plaintiffs.

### 2. Dollar Value of Claims

Most DTPA cases involve small claims filed by individuals. The data in Table 3 below reveals that approximately 53% of all DTPA cases filed alleged damages of less than \$25,000.<sup>58</sup> Less than one-quarter (21.7%) of all cases in this Study alleged damages of \$100,000 or more, and less than 15% alleged \$200,000 or more in damages.<sup>59</sup>

54. Almost 60% of cases filed exclusively against individual defendants sought damages under \$25,000. Less than 8% of these cases against individuals sought damages of \$200,000 or more. *See* Appendix 2.

55. *See* Table 1.

56. *Id.*

57. If resources had become available we would have liked to evaluate samples of cases filed in 1987 and 1988.

58. There were 215 cases filed in 1985 in this study for which information on the amount of damages sought was reported: 56 (68%) of the business cases and 159 (71%) of the individual cases had such information. In the 1986 sample, there were 301 (74%) cases for which information was available on the damages sought. Ninety-three (80%) of the business cases and 208 (71%) of individual cases had such information. *See* Appendices 3 and 4.

59. *See* Table 3. Unless otherwise stated, the dollar amount of the damage claim listed is the amount of actual damages alleged. *Id.*

TABLE 3: ANALYSIS OF DAMAGES SOUGHT IN CASES IN WHICH  
THE AMOUNT CLAIMED WAS SPECIFIED\*  
(Cases Filed Study)

<u>Amount Sought</u>	<u>All Cases</u>	<u>Bus. Pltfs.</u>	<u>Ind. Pltfs.</u>
\$200,000 or more	14.5% (75)	28.2% (42)	9.0% (33)
\$100,000 - 199,999	9.1% (47)	10.7% (16)	8.4% (31)
\$25,000 - 99,999	23.4% (121)	28.2% (42)	21.6% (79)
\$1 - 24,999	53.0% (273)	32.9% (49)	61.0% (224)
TOTAL	100% (516)	100% (149)	100% (367)

\* The number of cases appears in parentheses. For further detail on this data, see Appendices 3, 4(A) and 4(B). These figures exclude 196 cases that contain no specific allegation for the dollar value of damages sought.

Cases with individuals as plaintiffs are dramatically different from business cases. The difference appears in both the Cases Filed and Dispositions Studies. Here, we concentrate solely on cases filed, which are summarized in Table 3.<sup>60</sup> Businesses tend to make larger DTPA claims than individuals, whose claims tend to be for relatively small dollar values. Almost one-half (48%) of all cases that specified a claim of over \$100,000 in actual damages were business cases, even though business cases constituted less than 29% of all filings for which damages claimed information was available. Fifty-six percent of all Cases Filed specifying damages of \$200,000 or more were business cases. In contrast, an overwhelming 82% of all cases requesting \$25,000 or less were individual cases, while only 18% of cases at this level were filed by business plaintiffs.<sup>61</sup> A second way of observing the same pattern centers on the percentage of business or individual plaintiff cases that involve large or small claims. Table 3 shows that 61% of all individual cases sought damages of under \$25,000, but only about one-third of the business cases fell into that category. Most individual cases use the DTPA for relatively small claims.<sup>62</sup> In con-

60. See *infra* Part IV (report of our Dispositions Study).

61. See Appendix 3.

62. See Appendix 4. Among all 1985 cases, 52% (112 out of 215) had claims under \$25,000, and 69% (148) had claims under \$50,000. *Id.* Among all 1986 cases, 53% (161 out of 301) sought damages below \$25,000, and 66% (200 out of 301) sought damages below \$50,000. *Id.*



trast, 28% of all business cases claimed more than \$200,000 in damages, while only 9% of the individual cases sought such large sums.

Another potentially important pattern appears by contrasting 1985 and 1986 cases. Table 4 below indicates that overall filings increased, but the size of the increase was substantially higher for business cases (61%) than for individual cases (31%). Also, there was an increased incidence of large value claims.

TABLE 4: DAMAGES SOUGHT—1985 CASES  
COMPARED TO 1986 CASES\*  
(Cases Filed Study)

Damages Sought	All Cases		Business Cases		Individual Cases	
	1985	1986	1985	1986	1986	1986
\$200,000 or more	11.2% (24)	16.9% (51)	25.0% (14)	30.1% (28)	6.3% (10)	11.1% (23)
\$100,000-199,999	8.8% (19)	9.3% (28)	5.4% (3)	14.0% (13)	10.1% (16)	7.2% (15)
\$25,000-99,999	27.9% (60)	20.3% (61)	33.9% (19)	24.7% (23)	25.8% (41)	18.3% (38)
\$1-24,999	52.1% (112)	53.5% (161)	35.7% (20)	31.2% (29)	57.9% (92)	63.5% (132)
TOTAL	100% (215)	100% (301)	100% (56)	100% (93)	100% (159)	100% (208)

\* For more detail on this data, see Appendix 4. The number of cases appears in parentheses. These figures exclude the 196 cases in which no dollar value was given in the damage allegation.

These data indicate an increase in claims seeking \$200,000 or more. Among business cases, the percentage seeking at least \$200,000 increased from 25% in 1985 to 30% in 1986, while the number of actual cases doubled. Among individual cases, however, the strongest growth of DTPA filings was in the small claim range (below \$25,000), where the number of cases filed increased 43%.<sup>63</sup> Business cases seeking \$100,000 or more increased by 141%, more than three times the 46% increase of individual cases in this category. Indeed, plaintiffs in business cases, which constituted only 29% of the entire 1986 sample, asserted more claims for \$200,000 or more than did plaintiffs in the individual cases at that dollar level for that year.<sup>64</sup>

As we have previously indicated, the cause of the change between 1985 and 1986 cannot be discerned from our data, and the change

63. See Appendix 4.

64. *Id.*

itself may be an artificial effect of our sampling procedure, but the disparity in who asserts large claims sets up a distinction that appears throughout these studies. The larger DTPA cases tend to be one business suing another business.<sup>65</sup> The converse is also the case: Individuals tend to assert smaller claims.<sup>66</sup>

### 3. Substantive Claims Asserted

#### a. Nature of the Disputes

The DTPA is a relatively broad statute. The substantive content supplements, rather than preempts, existing common or statutory law. Its purpose was generally to cover a waterfront of potential consumer litigation, giving a broadly contoured remedy system to individual claimants. Our data indicate that the DTPA achieves this objective and that allegations arise across a broad spectrum of disputes.

One measure of this centers on the underlying relationship from which the DTPA claim arises. Table 5 illustrates, for both business and individual claimants, that DTPA allegations center on disputes over goods and services and, to a lesser extent, on disputes related to real estate, insurance and financial transactions.

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TABLE 5: UNDERLYING TYPE OF RELATIONSHIP IN  
DISPUTE IN DTPA CLAIMS\*  
(Cases Filed Study)

<u>Subject of Claims</u>	<u>All Cases</u>	<u>Business</u>	<u>Individual</u>
Goods	29.5% (210)	33.3% (66)	28.0% (144)
Services	38.1% (271)	32.8% (65)	40.1% (206)
Real Estate	16.2% (115)	12.1% (24)	17.7% (91)
Financial	9.8% (70)	13.1% (26)	8.6% (44)
Insurance	6.4% (46)	8.6% (17)	5.6% (29)
TOTAL	100% (712)	100% (198)	100% (514)

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\* For additional detail on this data, see Appendix 5. The number of cases appears in parentheses.

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65. See Tables 3 and 4 and Appendix 4.

66. See Table 2 and Appendices 1 and 2.

Over 38% of all DTPA cases in the Cases Filed Study pertain to disputes over the sale of services, and almost 30% involve the sale of goods. Real estate cases comprise 16% of all cases. Services-related and real estate cases are more prevalent among individual cases than among business cases. In contrast, finance-related cases (including disputes over loans, banking relationships and investments) were a substantial component of the business cases, and the number of such DTPA claims increased among business cases from 5 in 1985 to 21 in 1986.<sup>67</sup>

Most DTPA cases involve small dollar claims below \$25,000.<sup>68</sup> As reflected in Table 6 below, however, large dollar value allegations are more common in real estate and finance disputes. While finance-related disputes accounted for less than 10% of all cases,<sup>69</sup> they produced 24% of all large claim cases over \$200,000. In this dollar range, there were more finance cases than any other type of dispute except services-related claims, which comprised 28% of the total of large cases.<sup>70</sup>

TABLE 6: TYPE OF UNDERLYING TRANSACTION\*  
(Cases Filed Study)

<u>Damages Sought</u>	<u>Goods</u>	<u>Services</u>	<u>Real Est.</u>	<u>Finance</u>	<u>Insurance</u>	<u>TOTAL</u>
\$200,000 or more	11.9% (17)	10.1% (21)	19.0% (15)	32.7% (18)	12.5% (4)	14.5% (75)
\$100,000-199,999	7.7% (11)	5.3% (11)	12.7% (10)	18.2% (10)	15.6% (5)	9.1% (47)
\$25,000-99,999	28.7% (41)	16.9% (35)	31.6% (25)	20.0% (11)	28.1% (9)	23.4% (121)
\$1-24,999	51.7% (74)	67.6% (140)	36.7% (29)	29.1% (16)	43.8% (14)	52.9% (273)
Total Cases With \$ Info.	100% (143)	100% (207)	100% (79)	100% (55)	100% (32)	100% (516)

\* For more detail on this data, see Appendices 6 and 7. The number of cases appears in parentheses. These figures do not include the 196 cases in which damage information was not available.

67. See Appendices 5, 6, and 7.

68. See Table 3.

69. See Table 5.

70. There were 18 finance cases and 21 services cases out of the total 75 cases in this dollar range.

## i. Services-Related DTPA Claims

An analysis of the type of transaction involved in the services-related DTPA cases filed appears in Table 7 below.

TABLE 7: SERVICES-RELATED DTPA CASES  
ANALYZED BY SUB-CODE\*  
(Cases Filed Study)

Subcode	All Cases	Business	Individual
Appraisal	3.3% (9)	6.2% (4)	2.4% (5)
Car Repairs	11.4% (31)	3.1% (2)	14.1% (29)
Construction	10.0% (27)	26.2% (17)	4.9% (10)
Home Repairs	35.4% (96)	4.6% (3)	45.2% (93)
Legal Services	10.0% (27)	4.6% (3)	11.7% (24)
Medical	1.9% (5)	0% (0)	2.4% (5)
Moving	4.4% (12)	9.2% (6)	2.9% (6)
Phone Services	4.1% (11)	13.8% (9)	1.0% (2)
Pool Repair	3.0% (8)	1.5% (1)	3.4% (7)
Security Service	3.7% (10)	7.7% (5)	2.4% (5)
Other**	12.9% (35)	23.1% (15)	9.7% (20)
TOTALS	100% (271)	100% (65)	100% (206)

\* These figures include 17 cases that fell into categories with small numbers of cases (accounting, advertising, commission payments, and extermination services) or for which there was no data on the type of service in issue. For more detail on this data, see Appendix 9.

\*\* The number of cases appears in parentheses.

A summary of the amount of damages claimed in services-related cases appears in Table 8 below.

**TABLE 8: SERVICES-RELATED DTPA CASES  
ANALYZED BY DAMAGES SOUGHT\*  
(Cases Filed Study)**

<u>Damages Sought</u>	<u>All Cases</u>
\$200,000 or more	10.1% (21)
\$100,000 - 199,999	5.3% (11)
\$25,000 - 99,999	16.9% (35)
\$1 - 24,999	67.6% (140)
Total cases with \$ Info.	100% (207)

\* For more detail on this data, see Appendices 8 and 9. The number of cases appears in parentheses. These figures do not include cases for which damage information was not available.

Services disputes are the largest category of DTPA claims. This indicates the importance of service contracts to ordinary consumers. These are also true small claim consumer cases. Sixty-seven percent of all individual plaintiffs with service-related disputes make claims below \$25,000.<sup>71</sup>

Home repair cases alone comprise 35% of the sample of services-related DTPA filings, and these claims almost exclusively are asserted in individual cases.<sup>72</sup> The home repair claims were almost all small damage claims, with 84% seeking recovery of less than \$25,000. Only 7% of the home repair cases sought \$100,000 or more, and 2% concerned claims for \$200,000 or more.<sup>73</sup>

Car repair claims, which frequently rely on the DTPA, normally involve small dollar disputes. They comprise 11% of all services-related claims.<sup>74</sup> Individuals made 94% of the car repair claims. Eighty-two percent of the cases sought less than \$25,000, and only one case sought damages over \$100,000.<sup>75</sup> This is true consumer litigation.

Legal services claims were 10% of the services-related claims and

71. See Appendix 8.

72. See Table 7 and Appendix 9.

73. See Appendix 9. Indeed, home repair cases seeking less than \$25,000 constituted 35% of all services cases. *Id.*

74. See Table 7.

75. See Appendix 9 (seeking damages under \$200,000).

may have been increasing in frequency in recent years.<sup>76</sup> These claims usually were asserted by individuals (89%).<sup>77</sup> Among all the legal services cases with damage information, 77.8% involved less than \$200,000.<sup>78</sup>

## ii. Sale of Goods-Related DTPA Claims

The next largest category involves sales of goods. The nature of the underlying transactions are reflected in Table 9.

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TABLE 9: SUMMARY OF SALE OF GOODS-RELATED DTPA CASES  
ANALYZED BY SUB-CATEGORY\*  
(Cases Filed Study)

<u>Sub-Categories</u>	<u>All Cases</u>	<u>Business</u>	<u>Individual</u>
Boats/Planes	8.6% (18)	6.1% (4)	9.7% (14)
Cars	32.0% (67)	4.5% (3)	44.4% (64)
Computers	9.5% (20)	28.8% (19)	0.7% (1)
Home Products**	15.7% (33)	13.6% (9)	16.7% (24)
Industrial Products	17.1% (36)	37.9% (25)	7.6% (11)
Mobile Homes	5.7% (12)	0.0% (0)	8.3% (12)
Other***	<u>11.4% (24)</u>	<u>9.1% (6)</u>	<u>12.5% (18)</u>
TOTAL	100% (210)	100% (66)	100% (144)

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\* For further detail on this data, see Appendices 10 and 11. The number of cases appears in parentheses.

\*\* "Home products" in this Table include standard household items plus satellite dishes and solar heat.

\*\*\* "Other" includes categories with small numbers of cases (e.g., jewelry, oil rigs).

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The breakdown for damages claimed in sale of goods cases is summarized in Table 10 below.

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76. *Id.*

77. See Table 7.

78. See Appendix 9.

TABLE 10: SALE OF GOODS-RELATED DTPA CASES ANALYZED  
BY DAMAGES SOUGHT\*  
(Cases Filed Study)

<u>Damages Sought</u>	<u>Business</u>	<u>Individual</u>	<u>All Cases</u>
\$200,000 or more	21.2% (11)	6.6% (6)	11.9% (17)
\$100,000 - 199,999	7.7% (4)	7.7% (7)	7.7% (11)
\$25,000 - 99,999	36.5% (19)	24.2% (22)	28.7% (41)
\$1 - 24,999	34.6% (18)	61.5% (56)	51.7% (74)
Total Cases With \$ Info.	100.0% (52)	100.0% (91)	100.0% (143)

\* For further detail on this data, see Appendices 10 and 11. The number of cases appear in parentheses. These figures do not include cases for which damage information was not available.

Sixty-five percent of all high dollar (\$200,000 or more) sale of goods cases involved business plaintiffs.<sup>79</sup> In contrast, individual cases predominated in the small value (below \$25,000) sale of goods cases, accounting for over 76% of all cases.<sup>80</sup> Analyzed differently, 21% of the business cases involved claims of \$200,000 or more, while only 6.6% of the individual plaintiffs made such high dollar claims.<sup>81</sup> In comparison, 62% of the individual cases concerning sale of goods sought under \$25,000, while only 35% of business cases sought these relatively small damages.

Most sale of goods cases in this Study concerned car purchases (32%), industrial products (17%), home products (16%) and computer sales (10%).<sup>82</sup> Individual plaintiffs were very common in disputes involving cars, mobile homes and home products. In the remaining cases filed by individuals, a wide array of miscellaneous goods were at issue, such as boats, solar heat devices and jewelry.<sup>83</sup>

We found no cases involving cigarette sales in the 1985 sample. In

79. See Table 10 and Appendices 6, 7, and 10.

80. See Appendix 10.

81. See Table 10.

82. See Table 9. Only 12% (17 cases) of all sale of goods cases with damage information sought damages of \$200,000 or more. Only one case involved home products, and one case involved computers at that damage level. The largest group of large value sale of good cases was the seven cases involving industrial products, which are most likely commercial business disputes, even if plaintiff was an individual in some instances.

83. See Appendix 9.

our 1986 sample, however, there were 4 cases, each filed by individuals.<sup>84</sup> The two cases that specified damages sought recovery in excess of \$200,000.<sup>85</sup> This type of personal injury tort and products liability action can not be viewed as the typical claim which the DTPA was devised to remedy.<sup>86</sup> Some sale of goods disputes involved business plaintiffs, such as the sale of computers and industrial products. The industrial products cases brought by business plaintiffs comprised a high percentage of the large dollar sale of goods cases.<sup>87</sup>

### iii. Real Estate-Related DTPA Claims

Real estate disputes accounted for 16% of the DTPA cases in our Cases Filed Study.<sup>88</sup> Individuals filed 79% of all real estate-related actions.<sup>89</sup>

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TABLE 11: SUMMARY OF REAL ESTATE-TYPE DTPA CASES  
ANALYZED BY SUB-CATEGORIES\*  
(Cases Filed Study)

<u>Sub-Categories</u>	<u>All Cases</u>	<u>Business</u>	<u>Individual</u>
Apartment	2.6% (3)	0.0% (0)	3.3% (3)
Condominium	13.0% (15)	29.2% (7)	8.8% (8)
House	53.0% (61)	12.5% (3)	63.7% (58)
Land	20.0% (23)	25.0% (7)	17.6% (16)
Office Space	11.3% (13)	29.2% (7)	6.6% (6)
TOTAL CASES	100% (115)	100% (24)	100% (91)

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\* The number of cases appears in parentheses. For more detail on this data, see Appendix 13.

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The real estate-related cases were relatively evenly divided among large, medium and small dollar claims, as reflected in Table 12 below.

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84. See Appendix 11(B).

85. *Id.*

86. See Montford, Barber & Duncan, 1989 *Texas DTPA Reform: Closing The DTPA Loophole in the 1987 Tort Reform Laws And The Ongoing Quest For Fairer DTPA Laws*, 21 St. Mary's L.J. 525, 538-39 (1990).

87. See Appendix 11.

88. See Table 5.

89. See Appendix 13. However, there may be a growing business interest in the DTPA in real estate disputes. In the uniquely business-oriented category of office space disputes, the number of claims increased from 2 in 1985 to 11 in 1986.



TABLE 12: REAL ESTATE-RELATED DTPA CASES ANALYZED BY DAMAGES SOUGHT\*  
(Cases Filed Study)

<u>Damages Sought</u>	<u>All Cases</u>
200,000 or more	19.0% (15)
\$100,000 - 199,999	12.7% (10)
\$25,000 - 99,999	31.6% (25)
\$1 - 24,999	36.7% (29)
Total Cases With \$ Info.	100.0% (79)

\* The number of cases appears in parentheses. For further detail on this data, see Appendices 12 and 13. These figures do not include the cases for which damage information was not available.

Plaintiffs in real estate-related cases claimed high damages with greater frequency than in all other types of cases except finance-related cases.<sup>90</sup> Among the real estate cases, 19% claimed \$200,000 or more in damages.<sup>91</sup> Only 37% of individual real estate-related cases claimed less than \$25,000, which is a much smaller percentage than the overall rate of 61% of individual DTPA cases claiming low damages.<sup>92</sup> In contrast, business cases in the real estate context asserted low value claims at approximately the same rate (36%) as business cases overall (33%).<sup>93</sup>

#### iv. Finance-Related DTPA Claims

“Finance-related” DTPA cases encompass disputes over loans, banking relationships, investments and other financial transactions. These cases constituted approximately 10% of our sample and have a higher proportion of business plaintiffs (37%) than do most of the other types of cases, as shown in Table 13 below.<sup>94</sup>

90. See Table 6 and Appendix 7.

91. Twenty-five percent of the business cases were in this range, as compared to only 17% of the individual cases. See Appendix 12. Among real estate cases that sought \$200,000 or more, there were 5 relating to home purchases, 4 involving condominiums, 3 involving office space, and 3 involving undeveloped land.

92. See Table 12.

93. See Table 12 and Appendix 7.

94. Overall, business cases comprised approximately 28% of all DTPA cases. See Table

TABLE 13: FINANCE-RELATED CASES  
(Cases Filed Study)

<u>Type of Plaintiff</u>	<u>Total Finance Cases</u>
Business	37.1% (26)
Individual	62.3% (44)
Total Finance-Related Cases	100% (70)

\* The number of cases appears in parentheses. For more detail on this data, see Appendix 14.

The finance-related cases are particularly notable also because they tend to be high value cases, as summarized in Table 14 below.

TABLE 14: FINANCE-RELATED DTPA CASES ANALYZED BY  
DAMAGES SOUGHT\*  
(Cases Filed Study)

<u>Damages Sought</u>	<u>Business</u>	<u>Individual</u>	<u>All Cases</u>
\$200,000 or more	54.5% (12)	18.2% (6)	32.7% (18)
\$100,000 - 199,999	29.7% (5)	15.2% (5)	18.2% (10)
\$25,000 - 99,999	9.1% (2)	27.3% (9)	20.0% (11)
\$1 - 24,999	13.6% (3)	39.4% (13)	29.5% (16)
Total Cases with \$ Info.	100% (22)	100% (33)	100% (55)

\* The number of cases appears in parentheses. For more detail on this data, see Appendices 14 and 15. These figures do not include the cases for which damage information was not available.

Among the 55 cases for which damage information was available, 33% sought damages of \$200,000 or more.<sup>95</sup> The business cases asserted higher claims more often than did individual cases. More specifically, two-thirds of the cases seeking \$200,000 or more were business cases.<sup>96</sup> Low value cases once again were more often individual, rather than business, plaintiffs.

1. Business cases comprised 31.6% of the sale of goods cases, 24% of the services cases, and 21% of the real estate cases. See Table 5.

95. See Table 14.

96. *Id.*

The finance-related DTPA cases also deserve special consideration because the disputes involved are not typically “consumer” oriented. For instance, as set forth in Table 15 below, disputes involving investments (such as the purchase of a business) constituted 56% of all the cases and were the basis of DTPA claims in both the business and individual cases. DTPA suits involving loans and banking relationships increased from 5 cases in 1985 to 26 cases in the 1986 sample.<sup>97</sup>

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TABLE 15: SUMMARY OF FINANCE-RELATED DTPA CASES  
ANALYZED BY SUB-CATEGORIES\*  
(Cases Filed Study)

<u>Sub-Categories</u>	<u>All Cases</u>	<u>Business</u>	<u>Individual</u>
Investments	55.7% (39)	50.0% (13)	59.1% (26)
Banking/Financial/Loans	44.3% (31)	50.0% (13)	40.9% (18)
TOTALS	100% (70)	100% (26)	100% (44)

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\* The number of cases appears in parentheses. For more detail on this data, see Appendices 14 and 15.

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#### v. Insurance-Related DTPA Claims

The last DTPA category covers disputes which arose from insurance relationships. Our search of court records and cases was directed at the categories most likely to include DTPA claims, but it was not specifically directed to insurance matters. The insurance case sample thus comprised only 6% of the whole.

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97. See Appendix 15.

TABLE 16: INSURANCE-RELATED DTPA CASES ANALYZED BY DAMAGES SOUGHT\*  
(Cases Filed Study)

<u>Damages Sought</u>	<u>All Cases</u>
\$200,000 or more	12.5% (4)
\$100,000 - 199,999	15.6% (5)
\$25,000 - 99,999	28.1% (9)
\$1 - 24,999	43.8% (14)
Total with Information	100% (32)

\* The number of cases appears in parentheses. For more detail on this data, *see* Appendix 16. These figures do not include the cases for which damage information was not available.

The largest insurance-related cases tended to be business cases, while the small value cases were, once again, filed by individual plaintiffs.<sup>98</sup> This was consistent with the services-related and sale of goods-related DTPA cases.

#### b. Provisions of the DTPA Asserted

One can assert four types of DTPA claims under Section 17.50(a): violation of a “laundry list” item enumerated in Section 17.46(b), breach of a warranty, unconscionability and an insurance-related claim. Our data indicate that most litigants allege DTPA claims in multiples rather than as single claims, even if a single transaction is the source of the suit. Non-DTPA claims, such as breach of contract, warranty, fraud, negligence, or products liability, are often raised in cases when DTPA issues or claims have been asserted.

Table 17 summarizes the DTPA cases in the Cases Filed Study according to the type of DTPA violations alleged by plaintiffs. While roughly one-quarter of all cases relied on a single type of DTPA violation,<sup>99</sup> the dominant pattern was allegations of multiple DTPA violations in each case. The 569 cases in this Case Filed Study produced claims of 1214 different DTPA violations. Of the 569 cases, laundry list claims appeared in 79%, warranty claims in 69%, and unconscio-

98. *See* Appendix 16.

99. *See* Appendix 18.

nability claims in 59% of the cases.<sup>100</sup>

TABLE 17: PERCENT OF CASES CONTAINING  
SPECIFIC DTPA ALLEGATIONS\*  
(Cases Filed Study)

Type of DTPA Claims Asserted	All Cases	Business Cases	Individual Cases
Laundry List	79.1% (450)	74.8% (122)	80.1% (328)
Warranty	68.7% (391)	72.4% (118)	67.2% (273)
Unconscionability	58.9% (335)	49.1% (80)	62.8% (255)
Insurance	6.2% (35)	8.0% (13)	5.4% (22)
Total No. Cases With Claim Info.	(569)	(163)	(406)

\* The percentages are the ratio of cases with the designated type of DTPA claim compared to the total number of cases brought by the type of plaintiff indicated (*i.e.*, business, individual or all cases) with DTPA claim information. The number of cases appears in parentheses. For more detail on this data, *see* Appendix 17. These figures do not include information on the 143 cases for which information on the specific type of DTPA violation alleged is unavailable.

The DTPA clearly extends the scope of substantive liability law. The best illustration of this revolves around the high frequency of unconscionability claims. Unconscionability is not a basis for liability outside of the DTPA. Under other legal theories, it merely creates a defense to contract liability. Under Section 17.45(5) of the DTPA, however, an unconscionable act consists of an act or practice which, to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid in a transaction involving transfer of consideration.

This form of liability protects consumers from over-reaching conduct by businesses. Our data indicate that a substantial number of cases filed by individuals include allegations of unconscionable conduct by the defendant. This suggests that one goal of creating this new form of liability is being met. Among the DTPA cases filed by indi-

100. *See* Table 17 and Appendix 17.

viduals, 63% contained such claims.<sup>101</sup> Use of the statute, however, does not distinguish between large and small claims or between the claims of businesses and the claims of individuals. Unconscionability claims occurred in 50% of the cases involving a claim of damages of at least \$100,000 and 63% of the cases for damages seeking \$200,000 or more.<sup>102</sup> These unconscionability claims were equally prevalent in large dollar commercial litigation among businesses and in individual cases. Almost 60% (22) of the business cases involving claims of \$200,000 or more included a claim of unconscionable behavior by the defendant, and just over 60% of individual cases of \$200,000 or more contained such claims.<sup>103</sup> DTPA allegations often do not stand alone in litigation, but are joined with other substantive law claims. However, the differing styles in which petitions are drafted made analysis of the alternative claims extremely difficult given our time and resources, and the subjective judgment necessary to conduct such an analysis.

The Cases Filed Study revealed significant patterns about the DTPA cases filed. It could not, however, shed light on the outcome of that litigation. Therefore, we analyzed all the DTPA trials held in 1986 and 1987 in our Dispositions Study discussed below.

#### IV. DISPOSITIONS STUDY

The study of Cases Filed yields little information about the outcome of DTPA litigation and the costs or benefits it imposes on litigants. Moreover, case outcomes hold great significance in understanding the character of DTPA litigation. Only 23% of the cases in the Cases Filed Study reached final disposition by the time that our data were collected in summer 1988 because of slow civil litigation dockets. These cases were too small in number to yield a representative sample of litigation under the statute, so we conducted a parallel analysis of DTPA-related trial dispositions in Harris County during 1986 and 1987.

The data were collected initially from weekly reports compiled in the so-called "Blue Sheets" and distributed to local attorneys by subscription. The Blue Sheets contain substantial summary information about all trials conducted in Harris County as well as some informa-

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101. *Id.*

102. *See* Appendix 17.

103. *See* Table 17.

tion about reported settlements of cases after assignment to a trial court.<sup>104</sup> These reports were the initial source of information to identify DTPA-related trials and to examine overall patterns of DTPA and non-DTPA litigation in Harris County during these two years. A general analysis of trial litigation patterns based on the Blue Sheets constituted the first part of the Dispositions Study.

The second aspect of the Dispositions Study focused exclusively on DTPA-related trials. For this part of the Study, follow-up telephone interviews were conducted with at least one attorney of record in all reported DTPA-related trials. This was necessary because numerous judgments have been made by the compilers of the Blue Sheet data and often the information contained in these reports was incomplete or inaccurate. Our data thus include not only information from the Blue Sheets, but also confirmation and, where necessary, corrections from counsel.

Taken together, these two analyses confirmed and extended the conclusions suggested in the Cases Filed Study that the DTPA is a highly significant part of the civil justice system in Harris County. In fact, the data establish that DTPA allegations dominate contract litigation in Harris County involving both individual and business plaintiffs. DTPA allegations appear in both large and small claims. DTPA treble damage awards range from cases with total damages of less than \$1,000 to judgments exceeding several million dollars.

#### A. *The DTPA in the Civil Justice System*

We began with the impression that DTPA claims were a major force in civil litigation and that cases with these claims were handled differently from other forms of civil litigation. After reviewing Blue Sheet data regarding all trials reported in the Harris County District Courts for 1986 and 1987, the results not only confirmed our belief about the importance of the DTPA, but also indicated an impact which was even broader than we had anticipated. Cases with DTPA claims constituted a large percentage of all trials in Harris County. They produced successful plaintiff verdicts more frequently than any type of civil claim other than worker's compensation claims. Further-

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104. These were mature cases ready for trial. During the years under study, the Harris County court rules provided that a case was not assigned permanently to an individual judge until the case was ready for trial.

more, they were the *single most common* source of enhanced damage awards in Harris County during the years we studied.

Based on the Blue Sheet data, DTPA-related cases comprised almost 15% of the 1353 trials conducted in Harris County during 1986 and 1987.<sup>105</sup> As indicated in Table 18 below, DTPA claims were the third most common type of case tried during these two years. DTPA cases ranked behind only automobile negligence cases and general contract-related litigation, and this latter category often involved DTPA allegations.

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TABLE 18: TYPES OF CLAIMS IN TRIAL CASES\*  
(Dispositions Study)

Automobile negligence	33.3% (450)
General Contract	25.9% (350)
DTPA allegations	14.9% (201)
Worker's compensation	12.2% (165)
General negligence	9.1% (123)
Premises liability	8.4% (114)
Professional malpractice	5.6% (75)
Products liability	3.9% (52)
Insurance disputes	4.3% (58)

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\* Total of categories exceeds 100% because of trials involving more than one category of claim.

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The figures in Table 18 should be treated as only approximations of actual litigation. Our data base did not include the actual complaints filed, and we were forced to make numerous subjective judgments in placing particular cases into one or more categories.

Despite their tentative nature, however, the data in Table 18 suggest the importance of the DTPA. We are dealing with a statute of great significance and not merely an infrequent or minor element of the civil justice system.

DTPA liability claims have a dominant role in contract litigation. DTPA claims were asserted in 58% of the contract-related cases.<sup>106</sup> This ratio rose dramatically when we excluded contract claims involv-

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105. See Table 18.

106. See Table 19.



ing insurance disputes and quasi-contract claims such as malpractice. After such exclusions, over 78% of the general contract-related trials involved DTPA allegations.<sup>107</sup>

The plaintiffs' success rate in DTPA-related trials during these two years was almost 61% when we include all cases in which plaintiff obtained a judgment, whether or not the judgment was specifically on a DTPA allegation.<sup>108</sup> This may be contrasted to a recorded plaintiffs' success rate in most other types of litigation of approximately 50%, as indicated in Table 19 below.

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TABLE 19: PERCENT OF PLAINTIFF VERDICTS  
(Dispositions Study)

Automobile accidents	51.3% (450 cases)
Workmens' compensation	60.6% (165 cases)
Contract-related	58.2% (350 cases)
General negligence	46.3% (123 cases)
Premises liability	25.2% (115 cases)
Other liability	53.3% (122 cases)

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These general patterns suggest the unique role of the DTPA in trial litigation. Worker's compensation issues, which are often administrative rather than closely contested liability issues, are the only type of cases which approach the plaintiffs' success rates in DTPA cases. The contract-related claims' high success ratio can be attributed largely to the role of DTPA-related cases in this category.

We saw in the Cases Filed Study that DTPA-related cases cover both low value and large claim litigation. This attribute carried forward into the Dispositions Study. The Blue Sheets indicated that 64 trials during the two-year period resulted in judgments in excess of \$500,000. Approximately 15% of these were DTPA-related cases. DTPA claims fell third in frequency in this group, behind automobile accident and general negligence cases. We will discuss the relationship between DTPA treble damages and large claim litigation later in Part IV(B)(3)(a). The general data regarding all trials, however, underscore a pattern that helps to place trebling of damages under the DTPA into an appropriate context.

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107. *Id.*

108. *Id.*

Outside of the DTPA successful plaintiffs may obtain enhanced damages (punitive or exemplary) in only a select group of cases, which usually require proof of especially culpable or wilful conduct by the defendant. DTPA discretionary trebling, on the other hand, can be imposed under a lesser standard. As a consequence, DTPA discretionary trebling occurs more frequently than does any other type of damage enhancement.

Our data reveal that discretionary treble damage awards occurred in 67 DTPA cases during 1986 and 1987. In contrast, the Blue Sheets indicate that in non-DTPA cases, punitive or exemplary damages were awarded in only 53 cases. Thus, DTPA cases accounted for 56% of all enhanced damages cases even though DTPA cases were only 15% of all trials. Damage enhancement occurred in 17.5% of all plaintiff verdict trials, but in over 50% of all cases with DTPA claims where the plaintiff won on some claim at trial and in over 60% of the DTPA cases where a plaintiff's verdict was entered on a DTPA count. Other than the DTPA, the most common source of punitive damage awards were claims of fraud, gross negligence and intentional injuries to persons. The frequency of each of these paled in comparison to that of DTPA trebling.

### B. *The DTPA in Litigation*

The Dispositions Study also examined data concerning all DTPA-related trials conducted in 1986 and 1987 and all reported DTPA non-trial dispositions. This included 201 DTPA-related trials and 151 non-trial dispositions. For trials, our data came from Blue Sheet reports and the results of telephone interviews with at least one counsel of record<sup>109</sup> in all reported cases. Settlement and other non-trial disposition data came solely from the Blue Sheet reports.

The Dispositions Study generally confirmed the themes that developed in the Cases Filed Study. The Dispositions data reveal extensive business use of DTPA allegations. While most DTPA trials involved individuals as plaintiffs, 20.9% of all cases tried involved business plaintiffs. The business cases consistently resulted in much larger dollar awards than cases involving only individual plaintiffs, as described in more detail in the next sections of this report.

The Dispositions Study also reveals important patterns in the addi-

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109. In almost every case, we contacted plaintiff's counsel.

tional remedies allowed under the DTPA. Our data disclose that discretionary trebling occurs frequently, even in large dollar claim cases, as discussed further in Part IV(B)(3)(a) below. It is less common in small claim cases where its role in consumer protection should be more clear. In addition, attorneys' fee awards are an important part in the total cost of the case to a losing defendant and are analyzed in Part IV(B)(3)(b). In many cases, in fact, attorneys' fees awards exceed the damages given to plaintiff. In these cases, the primary beneficiary of the DTPA is arguably the attorney.

### 1. Success Rates and Substantive DTPA Scope

The plaintiffs' success rate in DTPA-related cases exceeds that in most types of Harris County civil litigation. The plaintiffs obtained favorable verdicts in 60.7% of the 201 DTPA cases tried in 1986-87.<sup>110</sup> This high success rate arguably resulted in part from the loosened causation and liability standards created under the DTPA. Plaintiffs have a lesser burden to meet at trial and, thus, achieve the necessary level of proof more frequently.

Our data include 151 reported non-trial dispositions in DTPA cases during this time period.<sup>111</sup> In addition, there were an unknown number of unreported settlements. The trial success rate occurs in cases where the defendant did not settle, possibly because of an excessively high demand from plaintiff or because the defendant believed that it could win at trial. Merely stating that the DTPA gives plaintiffs a higher probability of success at trial does not indicate how well the statute is functioning. A strong argument can be made that, at least for low value consumer claims, the enhanced success rate achieves the explicit statutory objective of enabling individuals to pursue their legal rights in consumer transactions. Inferences about the impact of this success rate and its policy implications require an analysis of who benefits and in which cases.

The success rate does not distribute evenly among business and individual plaintiffs. Regardless of the type of transaction involved, business claimants were less likely to succeed at trial than were individuals. Table 20 summarizes the data for all trials.

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110. See Table 20.

111. See Appendix 19.

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**TABLE 20: DTPA PLAINTIFFS' VERDICT RATE\***  
(Dispositions Study)

<b>ALL TRIALS</b>	<b>60.7% (201)</b>
<b>Business:</b>	<b>50.0% (42)</b>
<b>Individuals:</b>	<b>63.5% (159)</b>

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\* The number of cases appears in parentheses.

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While individual cases resulted in favorable plaintiff verdicts in 63.5% of the cases, the business plaintiffs' success rate was only 50%.<sup>112</sup> Many more of the business cases involved larger claims than did the individual cases. We believe that the disparity in these outcomes results from the underlying character of the cases, the degree of preparation by the lawyers and the scrutiny imposed by the fact-finder, rather than merely a greater willingness by jurors or courts per se to find favorable verdicts for individuals.

In both of the foregoing figures we include all cases where plaintiff obtained a judgment, whether or not the judgment was on a DTPA count. While DTPA-related trials frequently produce verdicts for the plaintiff, not all verdicts are entered on the DTPA claim. Table 21 below outlines the basis of verdicts in cases awarding damages.

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**TABLE 21: BASIS FOR PLAINTIFF VERDICT\***  
(Dispositions Study)

<b>DTPA Claim Alone</b>	<b>76.2% (93)</b>
<b>DTPA and Other</b>	<b>7.4% (9)</b>
<b>Other Claim Alone</b>	<b>16.4% (20)</b>
<b>TOTAL</b>	<b>100% (122)</b>

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\* The number of cases appears in parentheses.

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The verdict awarding damages was entered on claims other than the DTPA in slightly more than 16% of all reported DTPA-related trials. If these cases are treated as DTPA losses, rather than cases

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112. See Table 20.

where the fact-finder merely entered judgment on an alternative cause of action, the DTPA claim success rate is 50.8%. It is important to note, however, that in most cases lacking a DTPA claim judgment our data do not indicate an express rejection of DTPA liability.

In over 76% of all trials in cases with DTPA claims where damages were awarded, the award was based solely on DTPA allegations. In some cases, this resulted from an actual and explicit loss on the non-DTPA claims. Much more often, however, one of the following occurred: (1) no non-DTPA allegations were made; (2) plaintiff elected at trial, in cases involving multiple claims, to proceed solely on the DTPA cause of action; or (3) plaintiff won a verdict on multiple claims and elected judgment only on the DTPA claim. Presumably, these elections were made in order to obtain treble damage awards available under the DTPA but not under contract and certain other causes of action or to take advantage of the DTPA's less stringent standards of proof.

Election of a DTPA cause of action also entitles a successful plaintiff to automatic recovery of attorneys' fees as part of the judgment. Plaintiffs, therefore, especially in cases sounding in tort, often seek either to rely solely on the DTPA claims or to include them in the package of remedies submitted to the fact-finder. For example, in three cases where judgment was rendered on several bases of liability, a very small DTPA award (e.g., \$4,000) supported an award of large attorneys' fees (e.g., \$78,000).<sup>113</sup> Thus, the prospects of recovering attorneys' fees makes the DTPA an attractive cause of action for the plaintiff.

The high overall success rate and the extent to which the DTPA serves as the sole or primary basis for liability support the view that the DTPA results in a significant extension of rules of substantive liability.

This effect is not restricted to the small claims litigation that, we believe, formed the policy core focus from which the DTPA itself arose. Indeed, as Table 22 below indicates, while verdicts based solely on the DTPA are extremely common for lower value claims, they are also common in high dollar litigation.

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113. For details on patterns pertaining to attorney's fee awards see *infra* Part III(B)(3)(b); see also Appendix 23.

TABLE 22: BASIS OF PLAINTIFFS' VERDICT BY SIZE OF TOTAL AWARD (NUMBER OF CASES)  
(Dispositions Study)

<u>Damages Awarded</u>	<u>Verdict on DTPA Claim Alone</u>	<u>All Cases with Pltf's Verdict</u>
\$100,000 or more	20	29
\$25,000-99,999	34	41
\$1-24,999	<u>39</u>	<u>52</u>
Total	93	122

Twenty of the 29 DTPA-related cases with total judgment awards of \$100,000 or more resulted from judgments based solely on a DTPA claim. Within this group, eight of the nine trial verdicts for business plaintiffs that involved total judgments of \$200,000 or more were based solely on a DTPA claim.<sup>114</sup> DTPA claims thus have a significant impact on large claim litigation.

## 2. Case Size and DTPA Liability

We believe that there are material differences in the role, purpose, and effect of the DTPA, with its treble damages and lax causation standards, in large claim cases as contrasted to small claim consumer complaints. Our data indicate a potentially important pattern in this respect: DTPA claims often involve large claims and recoveries, especially as to claims made by businesses.

There are two ways of describing the size of a trial award for the purpose of understanding the DTPA's effect in civil litigation. One approach focuses on the "actual" damages awarded. The other concentrates on the total judgment or settlement amount, including any damages enhancement and any attorneys' fees awarded.

### a. Total Judgment Amounts

In our data, the average total judgment in DTPA-related trials was \$175,819. Table 23 summarizes the distribution of total judgment and settlement amount. As these figures indicate, a significant portion of DTPA trials result in large damage awards.

114. See Appendix 22.

TABLE 23: SIZE OF TOTAL PLAINTIFFS RECOVERY\*  
(Dispositions Study)

<u>Damages Recovered</u>	<u>Trial Awards</u>	<u>Non-Trial Amount**</u>	<u>All Cases</u>
\$200,000 or more	13.1% (16)	4.5% (3)	10.1% (19)
\$100,000-199,000	10.7% (13)	1.5% (1)	7.4% (14)
\$25,000-99,999	33.6% (41)	19.4% (13)	28.6% (54)
\$1-24,999	42.6% (52)	74.6% (50)	53.9% (102)
TOTAL	100% (122)	100% (67)	100% (189)

\* The number of cases appears in parentheses. For more detail on this data, see Appendices 19 and 20.

\*\* Non-trial amounts exclude 84 cases for which no damage information was available.

Table 23 also demonstrates that settlements result in smaller recovery amounts than do judgments rendered after trial. This result would be expected in any liability system.

The combination of small settlements and small trial verdicts of below \$25,000 indicates that the DTPA performs the role intended for the statute. It provides a remedial system for consumers with small dollar claims and enables them to hire and pay for counsel and to obtain awards at trial that are apparently adequate incentives to sustain low dollar value claim litigation. Almost 54% of all DTPA dispositions, including almost 43% of DTPA verdicts after trial, fall below \$25,000 and may fit this description.

Overall, over 80% of all DTPA-related dispositions in our study yielded a total recovery to the plaintiff of less than \$100,000. The lower value claims almost entirely involved individual plaintiffs, not business plaintiffs. Among all dispositions where the plaintiff was successful and the amount received was below \$10,000 in total, over 90% involved only individual plaintiffs.<sup>115</sup>

In contrast, claims and awards in high value cases involve a much larger proportion of businesses.<sup>116</sup> As Table 23 indicates, large DTPA-related recoveries are also common. Over 17% of all judgments and settlements favoring plaintiffs on which data on the size of the recoveries were available resulted in total liability of \$100,000 or

115. See Appendix 20.

116. See Appendices 19 and 20.

more.<sup>117</sup>

The value and utility of the DTPA's special protections for the plaintiff may be debated in these large recoveries. The amount at issue itself plus traditional contract, warranty, and tort theories provide adequate bases for instituting the litigation and for attorneys undertaking representation; there is no real need for the additional incentives of the DTPA. Where defendant in such cases acted maliciously, grossly negligent or recklessly, damage enhancement as a form of punishment is available under traditional exemplary or punitive damages standards. Otherwise, recovery of actual, foreseeable damages on traditional, more balanced theories should be sufficient.

#### b. Actual Damages Amounts

Another important measure of the DTPA is in the distribution of claims based on the "actual" damages awarded. This measure strips away distortions created by attorneys' fee awards and treble damage enhancements. For this analysis, we concentrated solely on cases tried and on cases in which the plaintiff obtained an award, at least in part, under the DTPA.<sup>118</sup>

In our data, the average actual damages award was \$61,316.<sup>119</sup> Once again, there were sharp differences between business and individual cases. Table 24 summarizes the distribution of actual damages awards.

The actual damages analysis accentuates the pattern described above for total judgments. In all DTPA trials where damages were awarded, 44.1% resulted in actual damages awarded of less than \$10,000, and almost 65% led to verdicts involving actual damages of less than \$25,000. In contrast, only 7.8% of all successful plaintiffs received actual damages of \$200,000 or more.

The small claims might not have been pursued in a more expensive and more uncertain litigation framework than that created by the DTPA. But, by any measure, the latter group are true "large" claims, the pursuit of which would most likely have occurred even without the special incentives created by DTPA rules. Applying a treble damage remedy in the latter cases escalates the recovery by the plaintiff,

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117. *Id.*

118. We have insufficient data on "actual" damages for non-trial of non-DTPA awards to make a reliable analysis and thus exclude these from our analysis.

119. See Appendix 21.



TABLE 24: ACTUAL DAMAGES IN DTPA PLAINTIFF  
VERDICT CASES\*  
(Dispositions Study)

\$200,000 and over	7.8%	(8)
\$100,000-199,999	4.9%	(5)
\$25,000-99,999	22.6%	(23)
\$10,000-24,999	20.6%	(21)
\$1-9,999	44.1%	(45)
TOTAL	100.0%	(102)

\* The number of cases appears in parentheses.

and the money paid by the defendant, increasing the total to at least \$600,000 if full trebling occurs. We can find no justification in the purposes of the DTPA for providing such large windfalls to plaintiffs and their counsel, unless there has been intentional and culpable wrongdoing by defendant. Cases of clear wrongdoing of that type, however, justify traditional punitive damages awards and do not require DTPA trebling to create an effective remedy.

#### c. Business and Individual Plaintiffs

Where individual and business plaintiffs each assert both large and small claims, the trials which involve business plaintiffs result in large awards much more frequently. Trials by individual plaintiffs predominantly involve small dollar claims. The average *total judgment* awarded to business plaintiffs was \$607,698, while the average total award to individual plaintiffs was \$86,023.<sup>120</sup>

Table 25 outlines the distribution of recovery based on total amount received by the successful plaintiff in both trial and non-trial cases. Over one-half of all recoveries in business cases were \$100,000 or more. Over one-half (58%) of all successful individual cases obtained recoveries below \$25,000, even including trebled amounts and attorneys' fees.

120. See Table 29.

TABLE 25: TOTAL RECOVERIES IN BUSINESS  
AND INDIVIDUAL CASES\*  
(Dispositions Study)

<u>Total Recovery</u>	<u>Business Cases</u>	<u>Individual Cases</u>	<u>All Cases</u>
\$100,000 or more	50.0% (15)	11.3% (18)	17.5% (33)
\$25,000-99,999	16.7% (5)	30.8% (49)	28.6% (54)
\$1-24,999	33.3% (10)	57.9% (92)	53.9% (102)
TOTALS	100% (30)	100% (159)	100.0% (189)

\* The number of cases appears in parentheses. These figures include trials and settlements, but exclude the non-trial cases for which no damages information was available.

While business cases constituted only 16% of the total of these cases, over 40% of all cases with at least \$100,000 in recovery involved a business plaintiff.<sup>121</sup> The same pattern occurs when we measure the amount of plaintiff's recovery by the actual damages awarded. As noted earlier, overall just 9% of the cases in which plaintiff won at trial on the DTPA claim produced actual damages of \$200,000 or more. Business plaintiffs' verdicts were a disproportionately large part of that group. Table 26 below shows that 29% of the successful business claimants received actual damages of \$200,000 or more.

TABLE 26: ACTUAL DAMAGES FOR BUSINESS AND  
INDIVIDUAL CASES\*  
(Dispositions Study)

<u>Actual Damages Recovered</u>	<u>Bus. Cases</u>	<u>Indiv. Cases</u>	<u>All Cases</u>
\$200,000 or more	29.4% (5)	3.5% (3)	7.8% (8)
\$100,000-199,999	23.5% (4)	1.2% (1)	4.9% (5)
\$25,000-99,999	11.8% (2)	24.7% (21)	22.6% (23)
\$1-\$24,999	35.3% (6)	70.6% (60)	64.7% (66)
TOTALS	100% (17)	100% (85)	100% (102)

\* The number of cases appears in parentheses. These figures exclude non-DTPA verdicts.

121. See Table 23 and Appendix 20.

Almost 53% of all business plaintiffs' verdicts resulted in \$100,000 or more in actual damages. Less than 5% of verdicts in individual cases reached that level. On the low end, almost 71% of the individual cases had actual damages below \$25,000. Even more pronounced, two-thirds of these low value, true consumer cases are below \$10,000 in actual damages.<sup>122</sup>

The pattern is clear. Individual plaintiffs dominate at low claim levels. Business plaintiffs predominate in large claim litigation. The reason for this difference is that it is principally businesses that reap the advantages of large treble damage enhancement, large attorneys' fee awards and relaxed causation standards which were originally designed to give small claim consumers a chance to correct wrongful or fundamentally unfair treatment.

#### d. Underlying Transactions

We discussed in the Cases Filed Study the variations and diversity that typifies the underlying transactions that give rise to DTPA claims. Our data regarding the underlying transactions in the cases in the Dispositions Study are less complete, but the information that is available indicates that the same patterns exist.

In general, our sample of DTPA litigation concentrated primarily on service contract disputes. These claims account for over 35% of all cases tried, as shown in Table 27. Goods and real estate disputes are the next most common types of claims which were litigated.

TABLE 27: TYPES OF DISPUTES AND TRIAL OUTCOMES  
(Number of Cases)  
(Dispositions Study)

<u>Type of Dispute</u>	<u>Plaintiff Won</u>	<u>Plaintiff Lost</u>	<u>All Cases</u>
Services	45	28	73 (36.3%)
Goods	30	24	54 (26.9%)
Real estate	24	9	33 (16.4%)
Insurance	12	9	21 (10.5%)
Financial	11	9	20 (10.0%)
TOTAL	122	79	201 (100%)

122. See Appendix 21.

There are potentially important differences in the various types of disputes concerning the amounts at issue in the litigation. These differences appeared whether we concentrated on the total plaintiffs' recovery or whether we limited the analysis to actual damage awards. Table 28 below lists the average actual damages award. It indicates that insurance and financial dispute litigation were the high value cases, while real estate, goods and services cases on average had far lower recoveries.<sup>123</sup>

TABLE 28: AVERAGE ACTUAL DAMAGE AWARDS\*  
(Dispositions Study)

<u>Type of Dispute</u>	<u>Business Cases</u>	<u>Individual Cases</u>	<u>All Cases</u>
Goods	\$ 98,309 (4)	\$ 23,281 (24)	\$ 34,000 (28)
Services	61,296 (6)	25,253 (32)	30,945 (38)
Real Estate	400,000 (1)	17,827 (20)	36,026 (21)
Insurance	517,250 (4)	179,625 (4)	348,438 (8)
Financial	121,500 (2)	67,864 (5)	83,188 (7)
<b>TOTAL</b>	<b>\$204,294 (17)</b>	<b>\$ 32,720 (85)</b>	<b>\$ 61,316 (102)</b>

\* The number of cases appears in parentheses.

The data on actual damage awards further documented the overriding difference between business and individual cases. The business average (\$204,294) was over six times as large as the average actual damages award in individual cases (\$32,270). As Table 29 indicates, these differences are amplified when we broaden the analysis to cover the entire recovery plaintiff received. The business judgment average was \$607,698 compared to the individual case average of \$86,023.

123. Because the higher value categories had few cases, we are not certain whether or not the distinction reveals a real difference repeated throughout DTPA cases.

TABLE 29: AVERAGE TOTAL JUDGMENT\*  
(Dispositions Study)

Type of Dispute	Business Cases	Individual Cases	All Cases
Goods	\$ 324,434 (5)	\$ 69,109 (25)	\$111,663 (30)
Services	190,527 (8)	49,080 (37)	74,226 (45)
Real Estate	1,600,000 (1)	58,488 (23)	122,718 (24)
Insurance	1,493,437 (5)	386,522 (7)	847,736 (12)
Financial	274,050 (2)	121,523 (9)	149,255 (11)
TOTAL	\$ 607,698 (21)	\$ 86,023 (101)	\$175,819 (122)

\* The number of cases appears in parentheses.

### 3. Special Damages Elements

The DTPA contains two special elements of damages that make the Act especially attractive to plaintiffs and particularly threatening to defendants. First, is the possibility of plaintiffs' recovery of attorneys' fees from losing defendants and, second, the possibility that plaintiffs' actual damages will be enhanced by discretionary trebling.

Neither of these special damages elements is routinely available for plaintiffs under causes of action other than the DTPA.<sup>124</sup> Our data documents that both trebling and attorneys' fees are common in DTPA trials, however, and that these special damage elements constitute a large and extremely important share of the actual recovery plaintiffs receive. When the focus is placed solely on cases in which plaintiff's judgment included an award under the DTPA, the impact of special damages can be seen by contrasting the "actual" damages awarded to the total judgment recovered. The average actual damages awarded was \$61,316.<sup>125</sup> The average total judgment was \$175,819, almost three times as large.<sup>126</sup> For trials conducted during these two years in Harris County, the special damage elements resulted in additional charges against defendant businesses of in excess of \$12 million.

124. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001, 41.001 (Vernon 1986 & Supp. 1990)(providing for attorney's fees and exemplary damages).

125. See Table 28.

126. See Table 29.

a. Treble Damages

Contemporary DTPA treble damage provisions contain two elements. One requires enhancement of low dollar elements of the claim, up to and including the first \$1,000 of actual damages awarded. This required enhancement, of course, occurs in all cases. The second element permits discretionary trebling of the actual damages if the fact-finder concludes that the defendant's DTPA violation was committed "knowingly." We focused on this latter aspect of the statute, which we describe as "discretionary trebling."

For trial cases, the data indicate that when a DTPA award occurred and actual damages exceeded the \$1,000 minimum for automatic trebling, discretionary treble damages were assessed 65.7% of the time.<sup>127</sup> This pattern of discretionary trebling indicates that trebling is a virtually automatic part of a DTPA trial award. We infer that the limitation in the statute restricting treble awards to "knowing" violations does not often insulate a defendant from multiple liability. It provides minimal (if any) distinguishing between dishonest defendants who consciously take advantage of and defraud plaintiffs and merchants who merely breach their contracts.

For low dollar claims, treble damage awards serve to provide an incentive for injured consumers to pursue their claims. When a treble award occurs in a large claim case, however, the chief function of the enhanced damages is to punish the defendant—presumably for wrongdoing.<sup>128</sup> The degree of punishment inflicted under the "knowingly" standard as currently formulated is often quite intense in large cases.

Even though the purpose behind treble damages (to provide an incentive to consumers and their attorneys to rectify smaller dollar disputes against sellers) is best served in small damage cases, our data indicate that discretionary trebling was more likely in large cases. Under the Act currently, the first \$1,000 of actual DTPA damages is automatically trebled. Beyond that, however, as Table 30 indicates,

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127. The ratio remained high even when we included trial verdicts in which no DTPA award occurred. Treble damages were assessed in 67 of the 122 cases with plaintiff verdicts (54.9%). Our data do not indicate the role in settlement or other non-trial dispositions of the possibility of treble damages. See Table 30 for a breakdown of this figure.

128. The Act may also have the effect of rewarding plaintiffs. However, public policy is not served by encouraging unwarranted litigation through creation of "rewards" beyond the goal of compensation to an injured party.

discretionary trebling occurred in only one-half of the very small claim cases.

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TABLE 30: DISCRETIONARY TREBLE DAMAGES: PERCENT BY  
ACTUAL DAMAGE AWARDS  
(Dispositions Study)

<u>Actual Damage Award</u>	<u>Percent Trebled</u>
\$100,000 or more	84.6% (11 of 13 cases)
\$25,000-99,999	73.9% (17 of 23 cases)
\$10,000-24,999	76.2% (16 of 21 cases)
\$1-9,999	51.1% (23 of 45 cases)

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Both the top and the bottom lines of Table 30 are revealing. Almost 85% of all large claim cases (\$100,000 or more) were enhanced by trebled damage awards. This was true whether the plaintiff was an individual or a business consumer. The trebling here often reached huge proportions, escalating awards even when the actual damages exceeded \$1,000,000.

The rate of discretionary trebling *dropped* as we moved to small claims, where the need for treble damage incentives appears to be the greatest. This remains true even when we eliminate the eight cases in which no discretionary trebling was possible because actual damages were less than \$1,000. In the remaining small verdicts, trebling occurred only 62% of the time (23 of 37 cases) as compared to 74% among cases with actual damage verdicts between \$25,000 and \$99,000.<sup>129</sup>

We have no data to explain this pattern. Perhaps when there was automatic trebling of the first \$1,000 in actual damages, fact-finders deemed additional discretionary awards unnecessary to compensate the plaintiff fairly or to punish the defendants, given the small size of the underlying transaction.

#### b. Attorneys' Fees

As with treble damages, the attorneys' fees provisions of the DTPA are designed to protect the consumer's ability to assert rights in small dollar cases. Awarding attorneys' fees to a successful plaintiff

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129. See Table 30.

removes a significant cost of litigation for that party. Of course, removing this cost from the plaintiff shifts it to the defendant, who thus pays attorneys' fees twice.

Our data confirm that attorneys' fees are an important facet of DTPA awards. In many cases, attorneys' fees are the single most significant cost element assessed against a losing defendant.

To examine DTPA attorneys' fee awards, we concentrated on trial verdicts in which plaintiffs prevailed on the DTPA allegations. Attorneys' fees were expressly awarded to successful plaintiffs in over 90% of all cases tried.<sup>130</sup> Including all cases (whether or not a fee was awarded), the average attorneys' fee was \$17,033.<sup>131</sup> This contrasts to an average actual damages award of \$61,316.<sup>132</sup> Using these simple figures, the attorneys' fee award averaged almost 28% of the average actual damage award. When we excluded cases where no attorneys' fees were awarded, the average fee increased to almost \$19,000.<sup>133</sup>

These gross figures, however, conceal potentially important patterns within the cases. Table 31 reveals that the average fee award, the average actual damages, and the ratio between the two varies in important respects as the size of the actual damage award changes.

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**TABLE 31: ATTORNEYS' FEES COMPARED TO ACTUAL DAMAGES  
IN TRIALS OF DTPA CLAIMS\*  
(Dispositions Study)**

<u>Actual Damages</u>	<u>Average Fees</u>	<u>Average Damages</u>	<u>Fee/Damage Ratio</u>
\$100,000 or more	\$63,256	\$368,698	17.2% (13)
\$25,000 - 99,999	\$19,285	\$ 41,456	46.5% (23)
\$1 - 24,999	\$ 7,143	\$ 7,692	92.9% (66)**

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\* The number of cases appears in parentheses.

\*\* Includes "no fee" cases.

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130. The absence of fee awards in the remaining cases was confirmed by our interviews with counsel. In the cases in which no fees were awarded, the most likely explanation is that plaintiffs' attorneys failed to request them. The fee award is an automatic component of a DTPA judgment for a successful plaintiff. In the cases where no attorneys' were included in the judgment, counsel must have been paid out of the damages awarded to the client, thus lowering the client's net recovery.

131. See Appendix 23.

132. See Table 28.

133. See Appendix 23.



While a 17% ratio between actual damages and attorneys' fees assessed for large cases might be predictable and reasonable, the ratio among lower value cases is astonishing. On average, in small claims litigation, defendants paid almost as much to the prevailing plaintiffs' attorneys as they paid in actual damages to plaintiffs.

The average numbers for small claims analysis should be adjusted by two facts. First, as we have said, in 10 cases our data indicate that no attorneys' fee was awarded even though the statute mandates it. Deleting these cases makes the average attorneys' fee rise to \$8,128 for the cases with recoveries below \$25,000.<sup>134</sup>

In contrast, however, the ratio between the attorneys' fee awards and actual damages is distorted upward by three cases in which the attorneys' fees were unusually high in contrast to low actual damages (e.g., over \$30,000 fee for "actual" DTPA damages below \$4,000).<sup>135</sup> In each of these cases plaintiffs received an award under the DTPA and under related claims. The attorneys' fees awarded under the DTPA reflected the value of the entire case and of all claims even though the "actual" DTPA damages were under \$4,000. Deleting these cases reduces the ratio of fees to damages in the lowest value cases.

We obtain a reasonable measure of the relationship between low dollar value recoveries and the attorneys' fee award by making both adjustments. Excluding the three atypical cases and the cases in which there was no fee award, the average attorneys' fees in cases with DTPA verdicts below \$25,000 were \$6,212, with average actual damages of over \$7,600, a ratio of over 80%.<sup>136</sup> Even with these adjustments, then, there is an extremely high ratio between fees and damages in low value cases. Furthermore, even without the three atypical cases, in 27 of the remaining 42 cases (over 60%) where actual damages were below \$25,000, the court assessed attorneys' fees that exceeded the actual damages recovered by the successful plaintiff.<sup>137</sup> In 14 of these cases, the fees exceeded even the trebled damage amount.

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134. See Appendix 23.

135. *Id.*

136. *Id.*

137. See Appendix 24.

## V. PROPOSED AMENDMENTS TO THE DTPA

The legislature that initially enacted the DTPA contemplated the Act as a measure to enhance the protection of individuals (primarily in small dollar transactions) injured in contract and other relationships with businesses. To provide sufficient incentive for these consumers and their attorneys to undertake this litigation, the treble damage and attorneys' fee provisions, as well as loosened intent, causation and damage standards, were included in the DTPA. These provisions give consumers leverage for settlements and create an incentive for sellers and service providers to correct errors or intentional wrongs without extended litigation.

This policy provides no justification for using the DTPA as a major element in large claim litigation. In large cases, the size of the prospective award itself serves as incentive to act, while the special DTPA "protections" become misplaced and unfairly punitive tools. Our data indicate this is now occurring in Texas courts. We, therefore, propose the following amendments to the Act:

### A. *Further Definition of the DTPA Cause of Action*

We propose a cap on actual damages recoverable under the DTPA at \$200,000:

Section 1: Insert after Section 17.50(d):

(e) In no event shall the amount of actual damages awarded in a suit filed under this section exceed \$200,000.

The absolute cap we propose serves the purpose of narrowing the large claim abuse of the DTPA without hindering individuals' typical claims, which are well below the \$200,000 cap. As our data show, a \$200,000 cap on actual damages would have affected less than 9% of all cases filed, only 9% of individual cases filed, and under 8% of DTPA actual damages awards, more than half of which are business cases.<sup>138</sup> This restriction on the DTPA would have affected less than 5% of all DTPA verdicts won by individual consumers.

In contrast to this relatively minimal impact on consumers, we believe that the proposed cap would drastically change the *in terrorem* impact of the threat of huge DTPA liability in large claim cases. This cap would, in a simple and direct manner, eradicate the most severe cases of abuse.

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138. See Tables 3 and 26; Appendices 3, 4, 19 and 21.

This actual damages limitation does not mean that every transaction for \$200,000 or more will not be fully protected by the DTPA. Even disputes in multi-million dollar transactions may involve \$200,000 or less in actual damages. These damages are commonly only a percentage of the original purchase price paid by the consumer. Moreover, this cap does not prevent additional recoveries to which the consumer still would be entitled, such as some enhanced damages and attorneys' fees.<sup>139</sup>

Our simple proposal creates a limit on actual damages that are recoverable, without creating complex legal issues that could undermine the entire statute. One must ask: Should a plaintiff with a claim for \$500,000 in actual damages, for instance, be allowed to rely on the pro-plaintiff provisions of the DTPA to obtain a trebling of damages it could not obtain under common law, receive payment of attorneys' fees it might not receive under other law, and benefit from relaxed proof standards not otherwise available? We believe that no sound policy reason exists to give these benefits indiscriminately to plaintiffs in such large cases.

#### B. *Treble Damages Available Under the Act*

The DTPA treble damage provision serves as a useful incentive and is a salutary punitive measure in low value cases. As to the larger value DTPA claims, however, there is no basis to allow unlimited treble damages. We therefore propose to limit trebling to the first \$100,000 of actual damages:

Section 2: Delete Section 17.50(b)(1), and insert the following:

- (1) the amount of actual damages found by the trier of fact plus two times that portion of the actual damages that does not exceed \$1,000. In addition to the actual damages, if the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award as additional damages, over and above the actual damages awarded, up to two times that portion of the actual damages in excess of \$1,000 that does not exceed \$100,000.

Among large claims based on intentionally wrongful conduct, the amount in controversy will justify litigation without trebling, enhanced damages may be available under traditional tort theories, and

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<sup>139</sup> In any event, even a plaintiff suffering damages exceeding \$200,000 could opt to seek up to \$200,000 under the DTPA and recover the rest under some other legal theory.

counsel ordinarily will be available to assist plaintiffs. The current DTPA treble damage element is a cumulative, punitive measure that is neither necessary nor justified in these cases. The current statute, in practice, results in trebled awards almost indiscriminately, and without being limited to intentional wrongdoing. The DTPA is the single most common source of enhanced damages in current Texas law. If defendant engaged in truly fraudulent conduct, traditional remedies will protect the injured and allow awards of punitive or exemplary damages.

We propose to cap treble damages by limiting them to the first \$100,000 of actual damages. This will not affect most DTPA lawsuits; our data indicate that actual damages awarded were below \$100,000 in almost 90% of all cases of individual plaintiffs.<sup>140</sup>

Moreover, the proposed cap allows for an additional award of up to \$200,000, which is a serious punishment to any defendant. Since the larger claims are increasingly business plaintiff-oriented, the effect of a trebling cap on true consumers will be small. The trebling of a \$1 million award, on the other hand, is not consumer protection; it is a windfall. Our proposal would bring the pro-plaintiff DTPA back to a focus on the audience it originally was intended to and should benefit.

### C. Clarification of the “Knowingly” Standard

We recommend a limit on “additional” damages to cases in which defendant’s conduct was truly culpable. In order to do so, the definition of “knowingly” must be modified to exclude “innocent misrepresentations” as follows:

Section 3: Delete current text of Section 17.45(9), and insert:

(9) ‘Knowingly’ means actual awareness of the falsity, deception, breach of warranty, or unconscionability of the act or practice giving rise to the consumer’s claim, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

After six years’ experience with the statute as originally enacted allowing automatic recovery of treble damages against all defendants found liable under the DTPA,<sup>141</sup> the Legislature in 1979 attempted to narrow the circumstances when “additional” (i.e., punitive) damages

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140. See Appendix 25.

141. *Woods v. Littleton*, 554 S.W.2d 662, 669 (Tex. 1977).

could be awarded. The Texas Legislature at that time added the requirement that plaintiff plead and establish that defendant's conduct had been committed "knowingly" in order to be eligible for an award of discretionary damages.<sup>142</sup> The statute since 1979 has defined "knowingly" as

actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim or, in an action brought under subdivision (2) of subsection (a) of Section 17.50 [for breach of a warranty], actual awareness of the act or practice constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.<sup>143</sup>

The legislative history reveals no explanation for the inclusion of words such as "unfairness" or "actual awareness of the act or practice constituting the breach of warranty." These phrases render this standard unnecessarily vague and broad. There now is no meaningful requirement in the Act that the "knowing" conduct in unconscionability or breach-of-warranty DTPA claims encompass any intent to be unfair or to breach a warranty per se. Rather, the defendant's knowledge of his conduct, regardless of any awareness of the implications, is enough to cause a finding of "knowingly" and thus "additional" damages for such violations.<sup>144</sup> Particularly now, where treble awards are unlimited in size, a trebling of damages because of unintentional but erroneous conduct is grossly unfair to defendants. It presents defendants with almost untenable risks of litigation.

142. Deceptive Trade Practices-Consumer Protection Act, ch. 603, 1979 Tex. Gen. Laws 1327, 1327; *Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 241 (Tex. 1985).

143. TEX. BUS. & COM. CODE ANN. § 17.45(9) (Vernon 1987)(emphasis added).

144. In various reported cases, the "knowingly" standard was applied by Texas appellate courts to affirm awards of additional damages without any showing of defendants' knowledge of any falsity, wrong, or intent to deceive. The courts reasoned that because defendants' representations were false and each was found to have known of the claimed falsity at the time of notice of the violation before suit was filed, defendants acted knowingly as a matter of law. Thus, the plaintiffs were entitled to treble damages. *See Jim Walter Homes, Inc. v. Gonzales*, 686 S.W.2d 715, 718-19 (Tex. Civ. App.—San Antonio 1985, writ *dism'd*); *Jim Walter Homes v. Valencia*, 690 S.W.2d 239, 241-42 (Tex. 1985), *aff'g* 679 S.W.2d 29 (Tex. Civ. App.—Corpus Christi 1984); *Mercedes-Benz v. Dickenson*, 720 S.W.2d 844, 855-56 (Tex. App.—Ft. Worth 1986, no writ); *Town E. Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 810-11 (Tex. App.—Dallas 1987, no writ). *But see Gonzales*, 686 S.W.2d at 719 (Cadena, J., dissenting)(alleging evidence did not support a knowing violation and therefore award of treble damages was erroneous).

Moreover, without parsing the wording of the definition of “knowingly,” courts have held that term to reflect a state of mind more culpable than “grossly negligent” but less culpable than “willful” or “intentional.”<sup>145</sup> As a result, conduct found to have been committed “knowingly” under the DTPA allows awards of damages for mental anguish.<sup>146</sup> It appears that these damages may be awarded even if unintentional conduct is the basis for the “knowingly” finding.<sup>147</sup>

This is also troubling because it is inconsistent with the law for exemplary damages as defined by the 1987 Legislature. In 1987, the Texas Civil Practices and Remedies Code was amended to implement certain tort law reforms. The amendments include a section on “exemplary damages,” which limits the grounds for recovering exemplary damages in certain tort actions to cases in which fraud, malice or gross negligence exist.<sup>148</sup> According to the statute, “gross negligence”

means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.<sup>149</sup>

The word “actual” is not found in the approved common law definition.<sup>150</sup> Thus, it is important that the “knowingly” standard of the DTPA be written so that courts must interpret it to mean that plaintiff prove defendant had sufficient wrongful intent to make the con-

145. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984).

146. *Id.* at 117-18.

147. *See North Star Dodge Sales, Inc. v. Luna*, 672 S.W.2d 304, 306 (Tex. Civ. App.—San Antonio 1984, no writ); *see also West v. Carter*, 712 S.W.2d 569, 573, (Tex. App.—Houston [14th Dist.] 1986, no writ).

148. Exemplary damages, ch. 2, 1987 Tex. Gen. Laws, 1st C.S., 37, 44.

149. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 1990)(emphasis added).

150. Common law standard: “Gross negligence . . . should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.” *See Williams v. Steves Indus., Inc.* 699 S.W.2d 570, 572-73 (Tex. 1985); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920-21 (Tex. 1981). Thus, the 1987 Legislature revealed an intention to require proof of defendant’s wrongful intent or state of mind, instead of an implied intent standard measured against an imaginary “reasonable man.” *See Montford & Barber, 1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System—Part 2*, 25 HOUS. L. REV. 245, 319-24 (1988)(discussing legislative history regarding gross negligence and exemplary damages); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5)(Vernon Supp. 1990)(defining gross negligence).

duct in fact more culpable than “grossly negligent” conduct. Our proposal serves this purpose.

#### D. *Extension of the “Offer of Settlement” Time*

The current notice and offer of settlement procedure provides too early and too short an evaluation period. There is inadequate opportunity for defendants (or plaintiffs) to investigate the merits of plaintiffs’ proposed claims and associated damages before the end of the defendants’ period for limiting additional damages. While wanting to make good faith efforts to settle the dispute, currently a defendant has only 30 days after receiving notice of the claim to evaluate allegations (about which little may be known or ascertainable) before the plaintiff can claim up to treble damages. If the defendant receives the notice before suit has been filed, no discovery is available, and there are no means by which to assess the accuracy and reasonableness of plaintiffs’ demands. We propose a more realistic time frame:

Section 4: In current Section 17.505(b), (c) and (d):

(b) Delete text after “not required.”

(c) Delete current text of (c), and insert:

(c) Any person who receives the written notice provided by Subsection (a) of this section or against whom a consumer’s claim under this section has been filed by suit or counterclaim may, up until six months after the date of filing of any such suit or counterclaim, tender to the consumer a written offer of settlement, including an agreement to reimburse the consumer a sum certain that is composed of (i) actual damages incurred by the consumer from the violations that are recoverable under this Chapter, and (ii) actual reasonable attorneys’ fees incurred by plaintiff in pursuing his claim up to the date of the offer. Any offer of settlement not accepted within 30 days of receipt by the consumer shall be deemed to have been rejected by the consumer.

(d) Delete second sentence of (d), and insert:

(d) If the court finds that (i) the amount tendered for actual damages in the settlement offer is equal to or substantially the same as the actual damages found by the trier of fact and (ii) an amount equal to reasonable attorneys’ fees was tendered, then the consumer may not recover damages in an amount in excess of the total amount tendered for damages in the settlement offer or the amount of actual damages found by the trier of fact, whichever is less, and the consumer may not recover attorneys’ fees in an amount greater than the amount tendered in the settlement offer.

This clarifies the two-part nature of settlement offers and the assessment of the offer after trial. Heretofore, the treatment of attorneys' fees in settlement offers was uncertain. This new procedure would encourage quick and efficient formal (and informal) discovery with adequate time for both sides to evaluate the actual damages incurred and the reasons for them. Thus, all parties can assess the value of plaintiffs' valid claims, while preserving plaintiffs' right to recover fully all damages and reasonable litigation expenses up to the time of the offer. The defendant is not denied a fair opportunity to limit the risk of additional damages if the settlement offer is refused.

## VI. CONCLUSION

The salutary principle of making Texas a "caveat venditor" state for consumer transactions through the strong powers and narrow defenses provided in the DTPA creates an unnecessary and possibly unhealthy effect in the small percentage of DTPA cases that arise from large dollar transactions. In these large claim cases, attorneys and numerous resources are generally available to aggrieved plaintiffs. In such contexts, the underlying transactions usually are complex, parties often have professional advisors, and the pro-plaintiff bias of the DTPA is inappropriate.

Entrepreneurs considering new businesses in Texas frequently express fears of unfair litigation, and the State's economy and job opportunities will suffer as long as this fear persists. In sum, the DTPA, while serving admirable goals for small value disputes, needs certain modifications to make the business environment in Texas healthier and fairer for all.

We began these studies with no preset judgments or policy positions to advocate. We suspected that the DTPA had become an important part of Texas law and civil litigation. This proves to be true. We have confirmed that the DTPA benefits many individual consumers, giving them effective access to the courts. This, too, is shown in our data.

Our data also reveal, however, that the DTPA reaches far beyond any common conception of consumerism and protection for individual consumers. We have in the DTPA a statute frequently applied in large claim litigation where it dramatically affects the balance between plaintiffs and defendants. We doubt that these effects represent sound public policy or the intent of Texas lawmakers, and we have suggested several ways to eliminate them.



**APPENDIX 1**  
**ANALYSIS OF DEFENDANTS IN DTPA CASES\***  
**(Cases Filed Study)**

Type of Pltf.	1985		1986		All Cases		Total
	Bus. D	Ind. D	Bus. D	Ind. D	Bus. D	Ind. D	
Business	75	7	109	7	184	14	198
Individual	191	32	259	32	450	64	514
Total	266	39	368	39	634	78	712

\* "Bus. D" means cases with at least one business defendant. "Ind. D" means cases with no business defendants.

**APPENDIX 2**  
**CASES WITH ONLY INDIVIDUALS AS DEFENDANTS\***  
**(Cases Filed Study)**

Amount Sought	All Cases	Bus. Pltfs.	Ind. Pltfs.
\$200,000 and over	7.8% (4)	0.0% (0)	9.5% (4)
\$100,000 - 199,999	7.8% (4)	11.1% (1)	7.1% (3)
\$25,000 - 99,999	27.4% (14)	44.4% (4)	23.8% (10)
\$1 - 24,999	56.9% (29)	44.4% (4)	59.5% (25)
TOTAL	100% (51)	100% (9)	100% (42)

**APPENDIX 3**  
**DOLLARS SOUGHT (1985 AND 1986)**  
**(Cases Filed Study)**

AMOUNT SOUGHT	ALL CASES	BUS. PLTFS.	IND. PLTFS.
\$200,000 and over	75	42	33
\$100,000 - 199,999	47	16	31
\$50,000 - 99,999	46	18	28
\$25,000 - 49,999	75	24	51
\$10,000 - 24,999	112	19	93
\$1 - 9,999	161	30	131
TOTAL CASES WITH \$ INFORMATION	516	149	367
\$ NOT INDICATED	196	49	147
TOTALS	712	198	514

APPENDIX 4

(A) DOLLARS SOUGHT — 1985 CASES  
(Cases Filed Study)

DAMAGES SOUGHT	ALL CASES			BUSINESS CASES			INDIVIDUAL CASES		
	Judg.	Settle	TOTAL	Judg.	Settle	TOTAL	Judg.	Settle	TOTAL
\$200,000 or more	1	2	24	1	1	14	0	1	10
\$100,000 - 199,999	1	2	19	0	0	3	1	2	16
\$50,000 - 99,999	0	9	24	0	3	9	0	6	15
\$25,000 - 49,999	1	6	36	0	3	10	1	3	26
\$10,000 - 24,999	0	9	39	0	3	9	0	6	30
\$1 - 9,999	0	12	73	0	5	11	0	7	62
NO. CASES WITH \$ INFORMATION \$ NOT INDICATED	3	40	215	1	15	56	2	25	159
TOTAL CASES	33	60	305	6	23	82	27	37	223

(B) DOLLARS SOUGHT — 1986 CASES  
(Cases Filed Study)

DAMAGES SOUGHT	ALL CASES			BUSINESS CASES			INDIVIDUAL CASES		
	Judg.	Settle	TOTAL	Judg.	Settle	TOTAL	Judg.	Settle	TOTAL
\$200,000 or more	0	8	51	0	5	28	0	3	23
\$100,000 - 199,999	0	4	28	0	0	13	0	4	15
\$50,000 - 99,999	0	3	22	0	1	9	0	2	13
\$25,000 - 49,999	0	10	39	0	1	14	0	9	25
\$10,000 - 24,999	1	13	73	0	5	10	1	8	63
\$1 - 9,999	0	15	88	0	5	19	0	10	69
NO. CASES WITH \$ INFORMATION \$ NOT INDICATED	1	53	301	0	17	93	1	36	208
TOTAL CASES	6	66	407	1	21	116	5	45	291

APPENDIX 5  
 SUBJECT OF SUIT — 1985 AND 1986  
 (Cases Filed Study)

TYPE OF DTPA CLAIM	ALL CASES		BUSINESS CASES			INDIVIDUAL CASES			
	1985	1986	TOTAL OF TYPE CLAIM	1985	1986	TOTAL OF TYPE CLAIM	1985	1986	TOTAL OF TYPE CLAIM
GOODS	91	119	210	31	35	66	60	84	144
SERVICES	113	158	271	26	39	65	87	119	206
REAL EST.	54	61	115	11	13	24	43	48	91
FINANCE	22	48	70	5	21	26	17	27	44
INSURANCE	25	21	46	9	8	17	16	13	29
TOTAL CASES	<u>305</u>	<u>407</u>	<u>712</u>	<u>82</u>	<u>116</u>	<u>198</u>	<u>223</u>	<u>291</u>	<u>514</u>

**APPENDIX 6**  
**(A) SUBJECT OF SUIT — 1985 CASES**  
**(Cases Filed Study)**

DAMAGES SOUGHT	BUSINESS CASES						INDIVIDUAL CASES					
	GOODS	SERV.	R.E.	FIN.	INS.	TOTAL W/INFO.	GOODS	SERV.	R.E.	FIN.	INS.	TOTAL W/INFO.
\$200,000 or more	5	5	2	2	0	14	3	4	2	0	1	10
\$100,000 - 199,999	1	1	0	1	0	3	6	2	5	2	1	16
\$25,000 - 99,999	10	5	2	0	2	19	9	15	9	4	4	41
\$1 - 24,999	8	8	1	1	2	20	22	43	14	5	8	92
<b>TOTAL CASES WITH \$ INFORMATION</b>	24	19	5	4	4	56	40	64	30	11	14	159
<b>\$ NOT INDICATED</b>	7	7	6	1	5	26	20	23	13	6	2	64
<b>TOTAL CASES WITH THIS TYPE CLAIM</b>	31	26	11	5	9	82	60	87	43	17	16	223

**(B) SUBJECT OF SUIT — 1986 CASES**  
**(Cases Filed Study)**

DAMAGES SOUGHT	BUSINESS CASES						INDIVIDUAL CASES					
	GOODS	SERV.	R.E.	FIN.	INS.	TOTAL W/INFO.	GOODS	SERV.	R.E.	FIN.	INS.	TOTAL W/INFO.
\$200,000 or more	6	7	2	10	3	28	3	5	9	6	0	23
\$100,000 - 199,999	3	3	1	4	2	13	1	5	4	3	2	15
\$25,000 - 99,999	9	9	2	2	1	23	13	6	12	5	2	38
\$1 - 24,999	10	12	4	2	1	29	34	77	10	8	3	132
<b>TOTAL CASES WITH \$ INFORMATION</b>	28	31	9	18	7	93	51	93	35	22	7	208
<b>\$ NOT INDICATED</b>	7	8	4	3	1	23	33	26	13	5	6	83
<b>TOTAL CASES WITH THIS TYPE CLAIM</b>	35	39	13	21	8	116	84	119	48	27	13	291

**APPENDIX 7**  
**SUBJECT OF SUIT ANALYZED BY PLAINTIFF AND DOLLARS SOUGHT**  
**(Cases Filed Study)**

DAMAGES SOUGHT	ALL CASES				BUSINESS CASES				INDIVIDUAL CASES			
	GDS.	SERV.	R.E.	TOTAL	GDS.	SERV.	R.E.	TOTAL	GDS.	SERV.	R.E.	TOTAL
\$200,000 or more	17	21	15	75	11	12	4	42	6	9	11	33
\$100,000 - 199,999	11	11	10	47	4	4	1	16	7	7	9	31
\$25,000 - 99,999	41	35	25	121	19	14	4	42	22	21	21	79
\$1 - 24,999	74	140	29	273	18	20	5	49	56	120	24	224
<b>TOTAL CASES WITH \$ INFORMATION</b>	143	207	79	516	52	50	14	149	91	157	65	367
<b>\$ NOT INDICATED</b>	67	64	36	196	14	15	10	49	53	49	26	147
<b>TOTAL CASES WITH THIS CLAIM</b>	210	271	115	712	66	65	24	198	144	206	91	514

**APPENDIX 8**  
**SERVICES — RELATED DTPA CASES**  
**(Cases Filed Study)**

DAMAGES SOUGHT	1985		1986		ALL CASES		TOTAL CASES
	BUSINESS	INDIV.	BUSINESS	INDIV.	BUSINESS	INDIV.	
\$200,000 or more	26.3% (5)	6.3% (4)	22.6% (7)	5.4% (5)	24.0% (12)	5.7% (9)	10.1% (21)
\$100,000 - 199,999	5.3% (1)	3.1% (2)	9.7% (3)	5.4% (5)	8.0% (4)	4.5% (7)	5.3% (11)
\$25,000 - 99,999	26.3% (5)	23.4% (15)	29.0% (9)	6.5% (6)	28.0% (14)	13.4% (21)	16.9% (35)
\$1 - 24,999	42.1% (8)	67.2% (43)	38.7% (12)	82.8% (77)	40.0% (20)	76.4% (120)	67.6% (140)
<b>TOTAL CASES WITH \$ INDICATED</b>	100% (19)	100% (64)	100% (31)	100% (93)	100% (50)	100% (157)	100% (207)
<b>\$ NOT INDICATED</b>	7	23	8	26	15	49	64
<b>TOTAL CASES</b>	26	87	39	119	65	206	271

APPENDIX 9  
 (A) SERVICES-RELATED DTPA CASES ANALYZED BY SUB-CATEGORIES — 1985 CASES  
 (Cases Filed Study)

Sub-Category	BUSINESS CASES						INDIVIDUAL CASES					
	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL		
NONE	0	0	1	0	1	0	0	0	0	0		
APPRAISING	0	0	0	0	0	0	2	1	0	3		
ACCOUNTING	0	0	0	1	1	0	0	1	0	1		
ADVERTISING	0	0	0	0	0	0	0	0	0	0		
CAR REPAIR	1	0	0	0	1	4	5	2	0	11		
COMMISSION	0	1	0	0	1	0	0	1	0	1		
CONSTRUCTION	1	2	1	1	5	4	2	1	1	8		
EXTERMINATION	0	0	0	1	1	0	0	0	0	0		
HOME REPAIR	1	1	0	1	3	6	23	5	3	37		
LEGAL SERVICES	1	1	0	0	2	2	2	3	1	8		
MEDICAL	0	0	0	0	0	2	0	0	0	2		
MEDICAL	2	1	1	0	4	0	1	1	0	2		
MOVING	1	1	1	0	3	0	1	1	0	2		
PHONE SERVICE	1	2	2	0	5	1	1	1	0	2		
POOL REPAIR	0	0	0	0	0	1	4	0	0	5		
SECURITY SERVICE	0	1	0	0	1	1	2	0	0	3		
OTHER	1	0	0	2	3	2	1	0	1	4		
TOTAL	7	8	5	6	26	23	43	15	6	87		

APPENDIX 9 (Continued)  
 (B) SERVICES-RELATED DTPA CASES ANALYZED BY SUB-CATEGORIES — 1986 CASES

Sub-Category	BUSINESS CASES					INDIVIDUAL CASES				
	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K +	TOTAL	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K +	TOTAL
NONE	0	0	1	1	2	0	0	0	1	1
APPRAISING	1	1	1	1	4	0	1	0	1	2
ACCOUNTING	0	0	0	1	1	0	1	0	0	1
ADVERTISING	0	0	2	0	2	0	0	0	0	0
CAR REPAIR	0	1	0	0	1	9	8	0	1	18
COMMISSION	0	1	0	0	1	0	1	0	0	1
CONSTRUCTION	3	4	1	4	12	0	1	1	0	2
EXTERMINATION	0	0	0	0	0	0	1	1	0	2
HOME REPAIR	1	0	1	0	2	4	49	1	2	56
LEGAL SERVICES	0	0	1	0	1	6	4	2	4	16
MEDICAL	0	0	0	0	0	2	1	0	0	3
MOVING	1	0	0	1	2	1	3	0	0	4
PHONE SERVICE	0	3	1	0	4	0	0	0	0	0
POOL REPAIR	0	1	0	0	1	0	2	0	0	2
SECURITY SERVICE	1	1	0	2	4	1	0	0	1	2
OTHER	1	0	1	0	2	3	5	1	0	9
TOTAL	8	12	9	10	39	26	77	6	10	119

**APPENDIX 10**  
**SALES OF GOODS-RELATED DTPA CASES\***  
**(Cases Filed Study)**

DAMAGES SOUGHT	1985		1986		ALL CASES		TOTAL
	BUS.	INDIV.	BUS.	INDIV.	BUS.	INDIV.	
\$200,000 or more	20.8% (5)	7.5% (3)	21.4% (6)	5.9% (3)	21.2% (11)	6.6% (6)	11.9% (17)
\$100,000 - 199,999	4.2% (1)	15.0% (6)	10.7% (3)	2.0% (1)	7.7% (4)	7.7% (7)	7.7% (11)
\$25,000 - 99,999	41.7% (10)	22.5% (9)	32.1% (9)	25.5% (13)	36.5% (19)	24.2% (22)	28.7% (41)
\$1 - 24,999	33.3% (8)	55.0% (22)	35.7% (10)	66.6% (34)	34.6% (18)	61.5% (56)	51.7% (74)
TOTAL CASES WITH \$ INDICATED	100% (24)	100% (40)	100% (28)	100% (51)	100% (52)	100% (91)	100% (143)
\$ NOT INDICATED	(7)	(20)	(7)	(33)	(14)	(53)	(67)
TOTAL	(31)	(60)	(35)	(84)	(66)	(144)	(210)

\* The number of cases appears in parentheses.



APPENDIX 11  
 (A) SALE OF GOODS-RELATED DTPA CASES BY SUB-CATEGORIES — 1985 CASES  
 (Cases Filed Study)

Sub-Category	BUSINESS CASES				INDIVIDUAL CASES					
	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K +	TOTAL	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K +	TOTAL
BOATS	0	0	1	1	2	2	4	0	1	7
CARS	0	1	0	0	1	10	9	4	0	23
CIGARETTES	0	0	0	0	0	0	0	0	0	0
COMPUTERS	2	3	3	0	8	0	0	1	0	1
HOME PRODUCTS	3	1	1	1	6	2	2	2	2	8
INDUSTRIAL PRODUCTS	2	2	4	4	12	2	1	0	2	5
JEWELRY	0	0	0	0	0	0	2	1	0	3
MOBILE HOME	0	0	0	0	0	2	3	1	1	7
OIL RIG	0	0	0	0	0	0	0	0	0	0
PLANE	0	0	1	0	1	0	0	0	0	0
SATELLITE DISH	0	0	0	0	0	0	1	0	0	1
SOLAR HEAT	0	0	0	0	0	0	0	0	0	0
OTHER	0	1	0	0	1	2	0	0	3	5
TOTAL	7	8	10	6	31	20	22	9	9	60

APPENDIX 11 (Continued)  
 (B) SALE OF GOODS-RELATED DTPA CASES BY SUB-CATEGORIES — 1986 CASES

Sub-Category	BUSINESS CASES					INDIVIDUAL CASES				
	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL
BOATS	0	0	1	0	1	1	2	0	0	3
CARS	0	0	1	1	2	15	19	7	0	41
CIGARETTES	0	0	0	0	0	2	0	0	2	4
COMPUTERS	1	6	3	1	11	0	0	0	0	0
HOME PRODUCTS	0	1	1	1	3	3	5	0	0	8
INDUSTRIAL PRODUCTS	4	3	3	3	13	3	1	1	1	6
JEWELRY	0	0	0	0	0	1	1	0	0	2
MOBILE HOME	0	0	0	0	0	2	1	2	0	5
OIL RIG	1	0	0	1	2	0	0	0	0	0
PLANE	0	0	0	0	0	1	0	2	1	4
SATELLITE DISH	0	0	0	0	0	0	1	0	0	1
SOLAR HEAT	0	0	0	0	0	3	2	1	0	6
OTHER	1	0	0	2	3	2	2	0	0	4
<b>TOTAL</b>	<b>7</b>	<b>10</b>	<b>9</b>	<b>9</b>	<b>35</b>	<b>33</b>	<b>34</b>	<b>13</b>	<b>4</b>	<b>84</b>

**APPENDIX 12**  
**REAL ESTATE-RELATED DTPA CASES ANALYZED BY DAMAGES SOUGHT\***  
**(Cases Filed Study)**

DAMAGES SOUGHT	1985		1986		ALL CASES		TOTAL
	BUS.	INDIV.	BUS.	INDIV.	BUS.	INDIV.	
\$200,000 or more	40.0% (2)	6.7% (2)	22.2% (2)	25.7% (9)	28.6% (4)	16.9% (11)	19.0% (15)
\$100,000 - 199,999	0.0% (0)	16.7% (5)	11.1% (1)	11.4% (4)	7.1% (1)	13.8% (9)	12.7% (10)
\$25,000 - 99,999	40.0% (2)	30.0% (9)	22.2% (2)	34.2% (12)	28.6% (4)	32.3% (21)	31.6% (25)
\$1 - 24,999	20.0% (1)	46.7% (14)	44.4% (4)	28.6% (10)	35.7% (5)	36.9% (24)	36.7% (29)
TOTAL CASES WITH \$ INDICATED	100% (5)	100% (30)	100% (9)	100% (35)	100% (14)	100% (65)	100% (79)
\$ NOT INDICATED	(6)	(13)	(4)	(13)	(10)	(26)	(36)
TOTAL CASES	(11)	(43)	(13)	(48)	(24)	(91)	(115)

\* The number of cases appears in parentheses.

APPENDIX 13

(A) REAL ESTATE-RELATED DTPA CASES BY SUB-CATEGORIES — 1985 CASES  
(Cases Filed Study)

Sub-Category	BUSINESS CASES					INDIVIDUAL CASES				
	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL
APARTMENT (AT)	0	0	0	0	0	0	0	0	0	0
CONDOMINIUM (CE)	1	1	0	2	4	4	0	0	1	5
HOUSE (HO)	2	0	0	0	2	9	11	7	4	31
LAND (LO)	2	0	2	0	4	0	3	1	2	6
OFFICE SPACE (OS)	1	0	0	0	1	0	0	1	0	1
TOTAL	6	1	2	2	11	13	14	9	7	43

(B) REAL ESTATE-RELATED DTPA CASES BY SUB-CATEGORIES — 1986 CASES  
(Cases Filed Study)

Sub-Category	BUSINESS CASES					INDIVIDUAL CASES				
	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL
APARTMENT (AT)	0	0	0	0	0	1	1	1	0	3
CONDOMINIUM (CE)	2	0	0	1	3	2	0	1	0	3
HOUSE (HO)	0	1	0	0	1	9	5	7	6	27
LAND (LO)	0	1	1	1	3	1	3	3	3	10
OFFICE SPACE (OS)	2	2	1	1	6	0	1	0	4	5
TOTAL	4	4	2	3	13	13	10	12	13	48

**APPENDIX 14**  
**FINANCE-RELATED DTPA ACTIONS ANALYZED BY DAMAGES SOUGHT\***  
**(Cases Filed Study)**

DAMAGES SOUGHT	1985		1986		ALL CASES		TOTAL
	BUS.	INDIV.	BUS.	INDIV.	BUS.	INDIV.	
\$200,000 or more	50.0% (2)	0.0% (0)	55.6% (10)	27.3% (6)	54.5% (12)	18.2% (6)	32.7% (18)
\$100,000 - 199,999	25.0% (1)	18.2% (2)	22.2% (4)	13.6% (3)	22.7% (5)	15.2% (5)	18.2% (10)
\$25,000 - 99,999	0.0% (0)	36.4% (4)	11.1% (2)	22.7% (5)	9.1% (2)	27.3% (9)	20.0% (11)
\$1 - 24,999	25.0% (1)	45.5% (5)	11.1% (2)	36.4% (8)	13.6% (3)	39.4% (13)	29.1% (16)
TOTAL CASES WITH \$ INDICATED	100% (4)	100% (11)	100% (18)	100% (22)	100% (22)	100% (33)	100% (55)
\$ NOT INDICATED	(1)	(6)	(3)	(5)	(4)	(11)	(15)
TOTAL CASES	(5)	(17)	(21)	(27)	(26)	(44)	(70)

\* The number of cases appears in parentheses.

**APPENDIX 15**  
**(A) FINANCE-RELATED DTPA CASES ANALYZED BY SUB-CATEGORIES — 1985 CASES**  
**(Cases Filed Study)**

Sub-Category	BUSINESS CASES					INDIVIDUAL CASES				
	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL
INVESTMENTS*	1	1	0	3	5	5	2	3	2	12
BANKING/ FINANCIAL/LOANS	0	0	0	0	0	1	3	1	0	5
<b>TOTAL</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>3</b>	<b>5</b>	<b>6</b>	<b>5</b>	<b>4</b>	<b>2</b>	<b>17</b>

**(B) FINANCE-RELATED DTPA CASES ANALYZED BY SUB-CATEGORIES — 1986 CASES**  
**(Cases Filed Study)**

Sub-Category	BUSINESS CASES					INDIVIDUAL CASES				
	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL	No \$ Indic.	\$1-\$24.9K	\$25K-\$99.9K	\$100K+	TOTAL
INVESTMENTS*	1	0	2	5	8	4	5	2	3	14
BANKING/ FINANCIAL/LOANS	2	2	0	9	13	1	3	3	6	13
<b>TOTAL</b>	<b>3</b>	<b>2</b>	<b>2</b>	<b>14</b>	<b>21</b>	<b>5</b>	<b>8</b>	<b>5</b>	<b>9</b>	<b>27</b>

\* Includes sales of businesses, as well as other investments.

**APPENDIX 16**  
**INSURANCE-RELATED DTPA ACTIONS ANALYZED BY DAMAGES SOUGHT\***  
**(Cases Filed Study)**

DAMAGES SOUGHT	1985		1986		ALL CASES		TOTAL
	BUS.	INDIV.	BUS.	INDIV.	BUS.	INDIV.	
\$200,000 or more	0.0% (0)	7.1% (1)	42.9% (3)	0.0% (0)	27.2% (3)	4.8% (1)	12.5% (4)
\$100,000 - 199,999	0.0% (0)	7.1% (1)	28.6% (2)	28.6% (2)	18.2% (2)	14.3% (3)	15.6% (5)
\$25,000 - 99,999	50.0% (2)	28.6% (4)	14.3% (1)	28.6% (2)	27.3% (3)	28.6% (6)	28.1% (9)
\$1 - 24,999	50.0% (2)	57.1% (8)	14.3% (1)	42.9% (3)	27.3% (3)	52.4% (11)	43.8% (14)
TOTAL CASES WITH \$ INDICATED	100% (4)	100% (14)	100% (7)	100% (7)	100% (11)	100% (21)	100% (32)
\$ NOT INDICATED	(5)	(2)	(1)	(6)	(6)	(8)	(14)
TOTAL CASES	(9)	(16)	(8)	(13)	(17)	(29)	(46)

\* The number of cases appears in parentheses.

**APPENDIX 17**  
**(A) TYPES OF DTPA CLAIMS MADE — 1985 CASES**  
**(Cases Filed Study)**

DAMAGES SOUGHT \$200,000 or more \$100,000 - 199,999 \$50,000 - 99,999 \$25,000 - 49,999 \$10,000 - 24,999 \$1 - 9,999	BUSINESS CASES										INDIVIDUAL CASES									
	NO IND. OF TYPE OF CLAIM					TOTAL NO. W/INFO. CASES					NO IND. OF TYPE OF CLAIM					TOTAL CASES W/INFO. CASES				
	L.LIST	W'TY	UNCON.	INS.	OF CLAIM	W/INFO.	TOTAL	CASES	L.LIST	W'TY	UNCON.	INS.	OF CLAIM	W/INFO.	TOTAL	CASES				
	8	11	5	1	1	13	14	4	7	4	1	1	1	9	10					
	2	2	1	0	0	3	3	10	10	9	2	3	3	13	16					
	6	5	3	1	2	7	9	10	10	10	1	1	1	14	15					
	5	4	3	0	4	6	10	17	17	14	2	2	2	24	26					
	7	5	4	1	1	8	9	22	21	13	2	5	5	25	30					
	7	9	4	1	0	11	11	36	34	20	3	13	13	49	62					
NO. CASES WITH \$ INFORMATION	35	36	20	4	8	48	56	99	99	70	11	25	25	134	159					
\$ NOT INDICATED	11	11	7	3	10	16	26	21	19	16	0	35	35	29	64					
TOTAL CASES OF TYPE CLAIM	46	47	27	7	18	64	82	120	118	86	11	60	60	163	223					

**(B) TYPES OF DTPA CLAIMS MADE — 1986 CASES**  
**(Cases Filed Study)**

DAMAGES SOUGHT \$200,000 or more \$100,000 - 199,999 \$50,000 - 99,999 \$25,000 - 49,999 \$10,000 - 24,999 \$1 - 9,999	BUSINESS CASES										INDIVIDUAL CASES									
	NO IND. OF TYPE OF CLAIM					TOTAL NO. W/INFO. CASES					NO IND. OF TYPE OF CLAIM					TOTAL CASES W/INFO. CASES				
	L.LIST	W'TY	UNCON.	INS.	OF CLAIM	W/INFO.	TOTAL	CASES	L.LIST	W'TY	UNCON.	INS.	OF CLAIM	W/INFO.	TOTAL	CASES				
	19	16	17	3	4	24	28	15	9	14	0	5	5	18	23					
	7	9	4	0	3	10	13	13	7	7	2	1	1	14	15					
	6	6	3	0	2	7	9	8	5	6	1	4	4	9	13					
	9	11	4	1	1	13	14	17	16	15	1	3	3	22	25					
	7	7	4	1	1	9	10	49	35	41	4	7	7	56	63					
	11	10	11	0	2	17	19	52	41	47	0	11	11	58	69					
NO. CASES WITH \$ INFORMATION	59	59	43	5	13	80	93	154	113	130	8	31	31	177	208					
\$ NOT INDICATED	17	12	10	1	4	19	23	54	42	39	3	17	17	66	83					
TOTAL CASES OF TYPE CLAIM	76	71	53	6	17	99	116	208	155	169	11	48	48	243	291					



**APPENDIX 18**  
**(A) CASES WITH ONLY ONE TYPE OF DTPA CLAIM — 1985 CASES**  
**(Cases Filed Study)**

	BUSINESS CASES					INDIVIDUAL CASES				
	L.LIST ONLY	W'TY ONLY	UNCON. ONLY	INS. ONLY	TOTAL CASES W/INFO.	L.LIST ONLY	W'TY ONLY	UNCON. ONLY	INS. ONLY	TOTAL CASES W/INFO.
AMOUNT CLAIMED	1	3	0	0	13	1	3	0	0	9
\$200,000 or more	1	0	0	0	3	1	2	0	0	13
\$100,000 - 199,999	0	1	0	0	7	1	1	1	0	14
\$50,000 - 99,999	1	1	0	0	6	5	3	2	0	24
\$25,000 - 49,999	1	1	0	0	8	2	2	0	0	25
\$10,000 - 24,999	1	3	0	1	11	6	4	3	2	49
\$1 - 9,999										
NO. CASES WITH \$ INFORMATION \$ NOT INDICATED	5	9	0	1	48	16	15	6	2	134
TOTAL TIMES CLAIM ASSERTED SOLO	3	2	0	2	16	4	5	1	0	29
	8	11	0	3	64	20	20	7	2	163

	BUSINESS CASES					INDIVIDUAL CASES				
	L.LIST ONLY	W'TY ONLY	UNCON. ONLY	INS. ONLY	TOTAL CASES W/INFO.	L.LIST ONLY	W'TY ONLY	UNCON. ONLY	INS. ONLY	TOTAL CASES W/INFO.
AMOUNT CLAIMED	2	0	1	0	24	2	0	0	0	17
\$200,000 or more	1	2	0	0	10	3	0	0	0	14
\$100,000 - 199,999	0	1	0	0	7	1	0	0	1	9
\$50,000 - 99,999	1	1	0	1	13	1	4	0	0	22
\$25,000 - 49,999	0	1	0	0	9	5	2	0	0	56
\$10,000 - 24,999	3	2	1	0	17	3	2	2	0	58
\$1 - 9,999										
NO. CASES WITH \$ INFORMATION \$ NOT INDICATED	7	7	2	1	80	15	8	2	1	176
TOTAL TIMES CLAIM ASSERTED SOLO	2	0	1	0	19	10	8	0	0	67
	9	7	3	1	99	25	16	2	1	243

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*DTPA EMPIRICAL STUDY*

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## APPENDIX 19

RECOVERY IN NON-TRIAL CASES  
 BY TYPE OF PLAINTIFF (NUMBER OF CASES)\*  
 (Dispositions Study)

<u>DAMAGES RECOVERED</u>	<u>BUS. PLTFs.</u>	<u>IND. PLTFs.</u>	<u>ALL CASES</u>
\$1,000,000 or more	0	1	1
\$500,000 - 999,999	0	0	0
\$200,000 - 499,999	2	0	2
\$100,000 - 199,999	1	0	1
\$50,000 - 99,999	0	4	4
\$25,000 - 49,999	1	8	9
\$10,000 - 24,999	3	13	16
\$5,000 - 9,999	0	11	11
\$1 - 4,999	<u>2</u>	<u>21</u>	<u>23</u>
TOTAL WITH DATA	9	58	67
CASES WITHOUT DATA	25	59	84

\* Information is from the Blue Sheets. These are mostly suits that settled after assignment to a particular court for trial.

## APPENDIX 20

TOTAL RECOVERY IN TRIAL CASES  
 BY TYPE OF PLAINTIFFS (NUMBER OF CASES)  
 (Dispositions Study)

<u>TOTAL RECOVERY</u>	<u>BUS. PLTFs.</u>	<u>IND. PLTFs.</u>	<u>ALL CASES</u>
\$1 million or more	3	1	4
\$500,000 - 999,999	4	2	6
\$200,000 - 499,999	2	4	6
\$100,000 - 199,999	3	10	13
\$50,000 - 99,999	1	17	18
\$25,000 - 49,999	3	20	23
\$10,000 - 24,999	3	23	26
\$5,000 - 9,999	1	12	13
\$1 - 4,999	<u>1</u>	<u>12</u>	<u>13</u>
TOTAL	21	101	122

## APPENDIX 21

**“ACTUAL DAMAGE” RECOVERY IN TRIAL CASES  
BY TYPE OF PLAINTIFFS (NUMBER OF CASES)  
(Dispositions Study)**

<u>ACTUAL DAMAGES RECOVERED</u>	<u>BUS. PLTFs.</u>	<u>IND. PLTFs.</u>	<u>ALL CASES</u>
\$1,000,000 or more	1	0	1
\$500,000 - 999,999	1	1	2
\$200,000 - 499,999	3	2	5
\$100,000 - 199,999	4	1	5
\$50,000 - 99,999	0	6	6
\$25,000 - 49,999	2	15	17
\$10,000 - 24,999	1	20	21
\$5,000 - 9,999	3	14	17
\$1 - 4,999	<u>2</u>	<u>26</u>	<u>28</u>
<b>TOTAL</b>	17	85	102

## APPENDIX 22

**TOTAL JUDGMENT BY TYPE OF  
SUCCESSFUL CLAIM (NUMBER OF CASES)  
(Dispositions Study)**

<u>ACTUAL DAMAGES RECOVERED</u>	<u>JUDGMENT ON DTPA CLAIM ALONE</u>		<u>JUDGMENT INCLUDES NON-DTPA CLAIMS</u>	
	<u>BUSINESS</u>	<u>INDIVIDUAL</u>	<u>BUSINESS</u>	<u>INDIVIDUAL</u>
\$1,000,000 or more	3	0	0	1
\$500,000 - 999,999	3	2	1	0
\$200,000 - 499,999	2	2	0	2
\$100,000 - 199,999	1	7	2	3
\$25,000 - 99,999	2	32	2	5
\$1 - 24,999	<u>3</u>	<u>35</u>	<u>1</u>	<u>12</u>
<b>TOTAL CASES</b>	15	78	6	23

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APPENDIX 23  
ATTORNEYS' FEES COMPARED TO ACTUAL DAMAGES  
(AVERAGE FEE)\*  
(Dispositions Study)

ACTUAL DAMAGES RECOVERED	BUS. PLTFs.	IND. PLTFs.	ALL CASES
\$1,000,000 or more	78,036 (9)***	30,000 (4)	63,256 (13)
\$25,000 - 99,999	15,500 (2)	21,714 (19)	21,122 (21)
\$10,000 - 24,999	17,850 (1)	6,293 (17)	6,935 (18)
\$1 - 9,999**	23,875 (4)	6,975 (36)	8,665 (40)
ALL CASES	52,917 (16)	11,719 (76)	18,884 (92)+

\* These figures *exclude* cases with no attorneys' fee awards (one business case and nine individual cases).

\*\* These include 3 cases with "deviant" ratios of damages to fees (#1 = \$78,000 fee/\$4,000 actual; #2 = \$25,000 fee/\$2,500 actual; #3 = \$26,755 fee/\$3,000 actual). Case #1 is a business case.

\*\*\* The number of cases appears in parentheses.

+ The average fee awarded (including 10 "no fee" cases) is \$17,033.

APPENDIX 24  
ATTORNEYS' FEES COMPARED TO ACTUAL DAMAGES  
(Dispositions Study)

SIZE OF FEE	ACTUAL DAMAGES			
	\$100,000+	\$25,000-99,999	\$10,000-24,999	\$1-9,999
\$100,000 or more	1	0	0	0
\$90-99,999	1	0	0	0
\$80-89,999	0	1	0	0
\$70-79,999	2	1	0	1
\$60-69,999	0	0	0	0
\$50-59,999	1	1	0	0
\$40-49,999	2	0	0	0
\$30-39,999	2	0	0	1
\$20-29,999	2	4	0	3
\$10-19,999	1	8	7	4
\$5-9,999	1	3	4	10
\$1-4,999	0	3	7	21
NO FEE AWARD	0	2	3	5
TOTAL:	13	23	21	45

APPENDIX 25  
AVERAGE "ACTUAL DAMAGE" AWARD\*  
(Dispositions Study)

<u>ACTUAL DAMAGES RECOVERED</u>	<u>BUS. PLTFS.</u>	<u>IND. PLTFS.</u>	<u>ALL CASES</u>
\$100,000 or more	374,055 (9)	356,643 (4)	368,698 (13)
\$25,000 - 99,999	34,068 (2)	42,160 (21)	41,456 (23)
\$10,000 - 24,999	13,780 (1)	15,953 (20)	15,850 (21)
\$1 - 9,999	<u>4,920 (5)</u>	<u>3,756 (40)</u>	<u>3,885 (45)</u>
ALL CASES	204,294 (17)	32,720 (85)	61,316 (102)

\* The number of cases appears in parentheses.

APPENDIX 26  
TYPES OF PLAINTIFFS  
(Dispositions Study)

	<u>BUSINESS</u>	<u>INDIVIDUAL</u>	<u>TOTAL</u>
Trials	42	159	201
Non-Trials	<u>34</u>	<u>117</u>	<u>151</u>
TOTAL	76	276	352