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A REMEDY FOR UNDERMADE AND OVERSOLD PRODUCTS—THE TEXAS DECEPTIVE TRADE PRACTICES ACT

MICHAEL P. LYNN*

In response to a national demand for consumer protection, a reform-minded Texas Legislature enacted the Deceptive Trade Practices—Consumer Protection Act (DTPA)[1] thereby creating what is essentially strict liability for the use of any false representation in the sale or lease of goods, real estate, or services. In a departure from the burden of proof under traditional common law fraud, the consumer seeking recovery under the DTPA need not demonstrate that the seller knew of the misrepresentation, nor even that the seller acted unreasonably in disseminating the false representation.[2] In order to establish liability, the DTPA generally requires only that the consumer prove a material misrepresentation upon which he justifiably relied. Moreover, once liability is established, the consumer may recover treble damages and reasonable attorneys' fees.[3]

These statutory remedies differ substantially from the common law contract and tort remedies for innocent misrepresentations and fraud. Under the common law, if a seller innocently makes a misrepresentation to the purchaser, the consumer cannot recover damages but rather can only rescind the contract and seek restitution.[4] Further, unlike the DTPA, even where the purchaser shows a specific intent to defraud, he can normally recover only actual damages.[5]

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1. TEX. BUS. & COMM. CODE ANN. § 17.41 (Supp. 1976). The original Act became effective for transactions entered into after May 21, 1973. The effective date of the 1975 amendments was September 1, 1975. Because the revisions are not retroactive, the original terms of the Act will continue to govern those transactions before September 1, 1975.

2. As used herein, common law fraud includes common law deceit. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 685-94 (4th ed. 1971) for a general discussion of the history and development of common law deceit.

3. TEX. BUS. & COMM. CODE ANN. § 17.50(b) (Supp. 1976).

4. *See generally* Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40 (1974); Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679 (1973); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1113, 1172-80 (1974).

5. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 9.2, at 594-98 (1973). At common law, punitive damages are allowed only in rare cases. *Id.* at 607.

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This novel piece of legislation is an important tool for the practicing lawyer, on whichever side of the docket he may be. Its full potential and effect are difficult to conceive, but some idea of its impact may be gleaned from an examination of the scope and structure of the Deceptive Trade Practices Act, including the effect of the 1975 amendments. Particular attention should be given to the exemptions and defenses to liability under the Act, as well as to the necessary elements of a cause of action. To aid in the interpretation of its terms, reference will be made to the development of the concepts of materiality, reliance, scienter, and damages in the areas of securities law, common law fraud, and products liability. Finally, foreseeable consequences of the effects of the amended Deceptive Trade Practices Act will be discussed and certain changes proposed.

THE ACT: STRUCTURE AND SCOPE

Under the DTPA either the state or the private litigant may sue for damages and injunctive relief.[6] Venue for the private litigant is in the county where the defendant resides, has his principle place of business, or where he is doing business.[7] The Attorney General may bring suit

6. TEX. BUS. & COMM. CODE §§ 17.47, 17.50 (Supp. 1976). Because of the concurrent standing of the state and the private litigant, the courts will inevitably be faced with the question of whether a prior Attorney General's suit should bar a subsequent private action against the same defendant. In Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799 (3d Cir. 1974), the court held that a prior Equal Employment Opportunity Commission administrative action did not bar a private litigant seeking damages. The court, in dicta, reasoned that because the Attorney General is forced by the nature of his office to serve broad public policies through litigation which may be inimical to the immediate interests of the individual discriminated against, the courts should not allow an Attorney General's suit to bar subsequent actions. *Id.* at 803; *accord,* Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-1204 (2d Cir. 1972), *citing* 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.411[1] (2d ed. 1965). *But see* Note, *New York City's Alternative to the Consumer Class Action: The Government as Robin Hood,* 9 HARV. J. LEGIS. 301, 323-26 (1972) in which the New York City ordinance is reviewed. That ordinance allows the city attorney to recover restitution on behalf of the bilked consumer, and requires that the city's consumer protection agency distribute that recovery to claimants. After the expiration of a one year period during which claimants are encouraged to come forward, however, the residual of the restitutionary fund inures to the consumer protection office and the individual consumer lose all rights to the funds. Whether the New York ordinance will be held to violate the Due Process Clause of the Constitution depends on the adequacy of the consumer protection agency's representation and notice to the consumer class. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *In re* Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir. 1974); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). The potential conflict of interest which arises because of the agency's vested interest in the distribution of the restitutionary funds may also be determinative of the statute's constitutionality. *See* Phillips v. Klassen, 502 F.2d 362 (D.C. Cir. 1974); Local 550, Airline Stewards & Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973).

7. TEX. BUS. & COMM. CODE ANN. § 17.56 (Supp. 1976). But if a consumer

in any of the above locations or wherever the transaction occurred.[8]

The Attorney General, through the Consumer Protection Division, may bring suit whenever the division has reason to believe that there is a violation of the Act or that a violation is about to occur, and that it is in the public interest to enforce the Act.[9] The state may also seek injunctive relief against those employing the deceptive practice, and is additionally authorized to obtain restitution or actual damages on behalf of the victim.[10] Further, the state may request the imposition of civil penalties for a violation of the Act or for the violation of an injunction already in force.[11]

The state's power to enforce the DTPA is complimented by a private action for treble damages, which may be maintained if a consumer[12] has been adversely affected by the use of a deceptive trade practice, the breach of an express or implied warranty, the use of an unconscionable action, or by a violation of the Texas Insurance Code and the regulations promulgated by the State Board of Insurance. Although the Act provides a wide range of protection to the public, between its inception in 1973 and the amendments enacted in 1975 its application was limited by certain definitions in the Act. For example, originally

counterclaims on the basis of a violation of the DTPA, the plaintiff's place of business determines proper venue.

8. *Id.* § 17.47(b). By consent of the parties, suit may be maintained in the District Court of Travis County.

9. *Id.* § 17.47. The DTPA does not specify what factors the Attorney General should consider in making the decision to prosecute. Presumably, conflicting policy and political considerations contribute to the outcome of each decision. In FTC v. Klesner, 380 U.S. 19 (1929), the Supreme Court construed language similar to that in the DTPA to mean that the Federal Trade Commission may file a complaint when the "public interest [is] specific and substantial." *Id.* at 28. This does not mean that the FTC may prosecute only offenders whose violations are large either in a monetary sense, or in the number of consumers affected. *See* Colgate-Palmolive Co., 59 F.T.C. 1452 (1961), *rev'd on other grounds,* 310 F.2d 89 (1st Cir. 1962), *rev'd,* 380 U.S. 374 (1965).

10. TEX. BUS. & COMM. CODE ANN. § 17.47(d) (Supp. 1976). For a listing of other states which allow the enforcing authority to seek damages and restitution on behalf of aggrieved consumers see Fact Sheet, *State Legislation to Combat Unfair Trade Practices,* 5 TRADE REG. REP. ¶ 50,190 (1974).

11. TEX. BUS. & COMM. CODE ANN. § 17.74(c) (Supp. 1976) (penalty of not more than $2,000 per violation of the Act, not to exceed a total of $10,000 per proceeding); *id.* § 17.47(e) (penalty of not more than $10,000 per violation of the injunction not to exceed $50,000 per proceeding).

12. Only purchasers are covered by the Act. It is therefore arguable that the entire sale must be consummated with all payments made before there is a purchase. Following that argument to its logical conclusion would demonstrate that the housewife who is injured by an exploding soft drink bottle while waiting at a checkout counter in a grocery store would not have an action under the DTPA. In such cases, the Attorney General may maintain actions because the DTPA does not state that the Attorney General may represent only purchasers. *Id.* § 17.47(a).

a consumer was narrowly defined as "an individual," rather than as a "person," a broader category, which the Act defines to include "individuals, partnerships, corporations, associations, and other groups."[13] Thus, certain remedies granted only to the "consumer" were initially inapplicable to all business associations except sole proprietorships, but the 1975 amendments have classified all partnerships and corporations as consumers.[14]

Another limitation in the original Act which has been removed by the 1975 amendments is found in the definition of "goods" which by its terms did not include realty.[15] A consumer is defined as one who purchases or leases goods or services while "goods" are defined merely to include personal chattels. The legislature declared unlawful the use of deceptive practices in "trade or commerce," which includes real estate. But the consumer was limited only to suits which involved the sale of goods and services and neither of those terms was defined to include real estate. Only the Attorney General, therefore, who is not a consumer within the meaning of the Act, would have standing to maintain an action under the broader "trade or commerce" terms.[16] In

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13. *Id.* § 17.45(3).

14. One justification for this result was that businesses have traditionally been considered capable of fending for themselves in the market place. In reality, however, there is little difference between the small corporation or partnership and the sole proprietorship protected by the Act. Neither have the capacity to deal effectively with deceptive trade practices. It should be noted, however, that the Attorney General is not bound by the definition of "consumer" and consequently could bring suit under the original Act against any business associations which deceived other business entities. *See id.* § 17.47. As a practical matter, however, the sheer volume of individual complaints dictates a necessarily limited ability on the part of the Attorney General to respond to the deception of businesses.

Section 17.45(4) has been amended to define a consumer as "an individual, partnership, or corporation." As the purpose of the DTPA is to eliminate consumer fraud and since small business entities should be considered consumers, it is clear that the legislature initially defined the consumer in excessively restrictive terms. By including within the revisions all business entities without regard for their ability to investigate and to confirm the quality of a product, it might seem that the legislature has now defined the consumer in overly broad terms. In fact, however, the Act bestows upon the courts a great deal of flexibility and discretion to apportion the respective responsibilities of the consumer and the representer to determine the truth of the representation, thereby determining where liability should fall. Indeed, because of the inherent difficulty in defining the capacity of a consumer to deal with misrepresentation the legislature was probably wise to have relied on elements within the prima facie case, such as the materiality of the misrepresentation and the justifiability of the consumer reliance, to perform that function.

15. The original § 17.45(1) defined goods to mean "tangible chattels bought for use." Tex. Laws 1973, ch. 143, § 1, at 323; *see* Cape Conroe Ltd. v. Specht, 525 S.W.2d 215 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

16. Although the Attorney General is not limited by the definition of consumer, he is constrained to some extent by the list of deceptive practices which are, for the most

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other words, the legislature declared the use of deceptive trade practices unlawful in real estate but failed to give the consumer standing to enforce the Act. The 1975 revision of the DTPA remedies this anomaly by including real estate within an expanded definition of goods, thereby enabling the consumer to maintain an action against the use of deceptive practices in real estate transactions.[17]

Furthermore, the original Act narrowly defined "goods" to include "chattels *bought* for use."[18] Thus, the consumer did not have a cause of action for misrepresentation when a product was rented or leased despite the fact that a consumer was defined in the original Act as one who purchased or leased goods. Since the controlling definition is that of "goods" rather than that of the "consumer," a consumer could purchase or lease goods or services but recovery under the DTPA was limited to purchased goods.[19]

Two further ambiguities in the Act have not been clarified by the recent amendments. First, the question of who has standing to sue under the Act is confused since the DTPA merely provides that one who is *adversely affected* by a deceptive trade practice may maintain an action.[20] Second, the goods of services must be purchased for *use*, but what constitutes use and who can be a user are not clear.

The use limitation can cause some difficulty because it is unclear whether the use must be that of the purchaser. For example, a manufacturer of defective products may argue that a supplier is not a purchaser for use under the DTPA when his intention is to sell the goods for another's ultimate use. Similarly, this question arises where an individual buys goods for the ultimate use of another, such as a gift. The purchaser in such instances would be covered only if "use" is defined to include the use of the item for its intended purpose by any person rather than as the personal use of the purchaser. Alternatively, making a gift of the goods could be liberally construed as a "use" within the

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part, expressly applicable only to goods and services. TEX. BUS. & COMM. CODE ANN. § 17.46(b) (Supp. 1976).

17. Sections 17.46(a) and (b) declare that deceptive acts are unlawful in "trade and commerce" which is defined to include real estate. *Id.* § 17.45(6).

18. Tex. Laws 1973, ch. 143, § 1, at 323 (emphasis added).

19. For transactions entered into prior to the effective date of the 1975 amendments, which expanded the definition of goods to include chattels and real estate purchased or leased, there is little possibility that a court will interpret "bought" so broadly as to include a lease transaction. It may, however, be possible to characterize the rental of goods as a service, which has never been restricted by the word "bought," and thereby bring the transaction within the ambit of the original DTPA.

20. TEX. BUS. & COMM. CODE ANN. § 17.50(a) (Supp. 1976).

meaning of the Act. Given the DTPA's express policy of favoring a liberal construction so as to promote the protection of the consumer, it would be logical to assume that the term "use" will be defined broadly.[21]

Standing to Sue

In contrast to a broad reading of "use," the courts will probably require a close nexus between the harm to a third person and the "adverse effect" to the consumer so as to avoid the result of giving the consumer standing to recover for damages to another. Two considerations will weigh heavily in determining the extent and nature of that adverse effect. First is the familiar requirement of an actual case or controversy before the court. The interest posited by the consumer may be so attenuated that the parties are not antagonistic or engaged in an actual controversy. In *Sierra Club v. Morton*[22] the Supreme Court held that one is not "adversely affected" within the meaning of the Administrative Procedure Act, and therefore does not have standing to sue, unless it is demonstrated that there has been either an economic harm or some other identifiable *personal* injury. Thus the outer boundary of standing under the DTPA, at least where federal courts are concerned, is marked by a constitutional requirement that the consumer demonstrate an identifiable personal harm although there is no requirement that the harm be simply one of economic loss. Therefore, arguably, the employer who simply suffers minor emotional distress over an employee injured by a falsely represented machine would have an identifiable personal harm sufficiently acute to sustain his standing under the Act.

Standing under the DTPA is further constrained by its express policy of consumer protection. The Deceptive Trade Practices Act requires liberal construction to protect the consumer against deceptive practices, and to provide efficient and economical procedures to secure that protection. If granting standing to a marginal consumer would neither advance the deterrent aspect of the Act nor compensate a real consumer harm, then finding an adverse effect would not further these policies. Hence, by implication, the courts would be required to deny the consumer standing to assert his claim.[23]

21. *Id.* § 17.44.
22. 405 U.S. 727 (1972).
23. *See* Data Processing Serv. Organization, Inc. v. Camp, 397 U.S. 150, 153 (1970), wherein the case or controversy requirement was defined in terms of the zone

Application to Professional Malpractice

After standing has been found, the DTPA declares unlawful any misrepresentation in the purchase or lease of either services or goods. The DTPA defines services to include "work, labor and services for other than commercial or business use."[24] Because the range of services supplied to consumers is quite broad, there may be application of the DTPA in areas other than those commonly regarded as necessitating special protection for consumers. The medical and legal malpractice area represents a prime area for the expansion of the statute. To attach liability under traditional negligence concepts the consumer must demonstrate that the service was rendered in an unreasonable manner.[25] Under the DTPA, however, the focus shifts from how the service is performed to a determination of whether the service meets the implicit or explicit representations made by the doctor or lawyer as to what the service will accomplish. For example, under a negligence theory a doctor may be considered unreasonable in failing to write out a prescription correctly. Under the DTPA, liability attaches because the doctor represents, at least implicitly, that the prescription carries with it some characteristic which is missing because of his error. In the first case the doctor must be at fault or have acted unreasonably, while in the second, it appears that the doctor will be strictly liable, no matter what amount of care the doctor exercised in writing the prescription nor how innocent the mistake.

Securities

Another area which may be open to the application of the Deceptive Trade Practices Act is the securities field. The definition of a security includes "investment contracts" of which there is an essential element of an expectation that one will profit from the *efforts of others*.[26] Conceptually, the purchaser of a security is buying "investment services" with at least an implicit representation by the issuer that the security will earn a competitive return on the investor's money. Therefore, if the character of those services is misrepresented, the consumer should have an action for treble damages under the DTPA.

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of interest to be protected by the statute. Thus the mandate to follow a particular policy also carries with it a constitutional dimension.

24. TEX. BUS. & COMM. CODE ANN. § 17.45(2) (Supp. 1976).

25. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 166 (4th ed. 1971).

26. SEC v. W.J. Howey Co., 328 U.S. 293, 297 (1946); *see* 1 L. LOSS, SECURITIES REGULATION 491 (2d ed. 1961).

It is not clear that the legislature intended the DTPA to cover these services, particularly when they have traditionally been regulated by comprehensive state and federal securities laws. Yet the Act does not exempt "investment services" from DTPA coverage, and more importantly it is difficult to see any basis for the courts to distinguish other financial services, such as those offered by an insurance company, which are clearly covered, from investment services.

Moreover, the higher fines and civil penalties, as well as clearer authority for the Attorney General to protect the security holder, would seem to complement existing Texas security laws. The Texas Securities Act provides that a securities violation may be punished by not more than $5,000 or imprisonment for up to 10 years,[27] while the DTPA gives the Attorney General the power to seek $10,000 in fines and restitution for identifiable persons.[28] Further, the Texas Securities Act provides for punitive damages, not to exceed twice the actual damages suffered by the plaintiff, when the misrepresentation is proven to have been willfully made.[29] In contrast, the DTPA provides for treble damages which, in most cases, can be demonstrated without showing any intent or willfulness on the part of the defendant.[30] Finally, the DTPA allows the Attorney General to bring suit whenever he has reason to believe that there has been a violation,[31] while the Securities Commissioner must bring a securities violation to the attention of the Attorney General under the Texas Securities Act.[32] Given that the fundamental purpose of both the Texas Securities Act and the DTPA is to protect the consumer, and given that the provisions of both acts are complementary, it is conceivable that the courts will allow overlapping jurisdiction of the two statutes in the securities field.

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27. TEX. REV. CIV. STAT. ANN. art. 581-29(A), (B) (1961). In the recent case of Bourland v. State, 528 S.W.2d 350 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), an attorney who participated in a land fraud scheme was held liable under the DTPA. The fraud centered around the procurement of investment capital for a resort community in Mexico, for which investors received an interest in the land and stock in a development corporation. Apparently no land was ever bought and the promoters converted the funds to their own use. Although liability was found on the basis of fraud without direct reliance on the securities aspect of the scheme, it would be but a short step for the courts to apply the Deceptive Trade Practices Act to securities.

28. TEX. BUS. & COMM. CODE ANN. § 17.47(c), (d) (Supp. 1976).

29. TEX. REV. CIV. STAT. ANN. art. 581-33(2) (1961).

30. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976).

31. *Id.* § 17.47(a).

32. TEX. REV. CIV. STAT. ANN. art. 581-3 (1961). Furthermore, the Securities Commissioner must first approach the district or county attorney in the county where the infraction has occurred.

Other Services

Although the range of services covered by the Act is extremely broad, the DTPA requires that they be rendered for other than a commercial or business use.[33] Precisely how this business use qualification is to delimit the Act remains unclear; it has not been clarified by the 1975 amendments. In a franchise operation, for example, the franchisor generally provides management training and consulting services to the franchisee.[34] Since these services are rendered within the commercial context, it is difficult to argue that they are not for a commercial or business use.[35] If an individual seeks vocational training, either in preparation for employment or to increase skills in his present position, it is not as clear that these services are for a commercial or business use. It is apparent that in this area the interpretation of the term business use involves a question of degree; that is, it must be determined how close a link to a business use is required in order to remove the purchase of a particular service from coverage. For example, while it is clear that a wage earner who has his income tax return prepared by an accountant is far removed from the commercial or business use limitation and hence is protected by the DTPA, a doctor who operates his own office may be engaging in a commercial use of these accounting services and consequently he would not be protected by the Act. Similarly, it will be difficult to determine when a service is provided to a partner in contrast to the partnership or to a large stockholder in contrast to the corporation, and thus to determine when the commercial involvement by the plaintiff will exclude him from the protection of the Act.

Exemptions and Defenses

In contrast to its broad coverage, the Deceptive Trade Practices Act contains only one specific exemption and one narrow defense to damages. Section 17.49(a) exempts the news media from liability for the transmission of a misrepresentation, but only if it is unaware of the misrepresentation. Actual rather than constructive knowledge of the mis-

33. TEX. BUS. & COMM. CODE ANN. § 17.45(2) (Supp. 1976).

34. For a good discussion of the types of control exercised over the franchisee by the franchisor, see Comment, *The Franchise as a Security: Application of the Securities Laws to Owner Operated Franchises,* 11 B.C. IND. & COM. L. REV. 228 (1970).

35. Although the Deceptive Trade Practices Act outlaws pyramid and referral schemes in § 17.46(b)(18) and (20), it is unclear whether the consumer has a cause of action, as those schemes are services for a business use.

representation is required; this knowledge may be inferred where objective manifestations indicate that it acted with actual awareness of the deception.[36]

Beyond the media exemption, the DTPA provides one narrow defense to a consumer class action and absolutely no defense to the individual consumer action.[37] Under the original Act the defendant was allowed to make restitution to *any* member of the class harmed by the misrepresentation, whereupon he could assert that the action complained of was the result of a bona fide error which occurred notwithstanding the use of reasonable procedures adopted to avoid the error.[38] Hence a literal reading of the Act would allow the defendant to give restitution to only one member of the class, and then defend against the other members of the class on the basis that reasonable procedures had been adopted to protect the consumer from *any error* even if the procedure adopted would not protect against the error which caused the harm. Clearly such a result would be absurd. The intent of the legislature is to protect the consumer, and allowing the defendant to circumvent the Act by an overly technical reading would subvert that purpose.

The 1975 revision of section 17.54 is an accurate reflection of what the legislature originally meant to enact.[39] The new amendments pro-

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36. TEX. BUS. & COMM. CODE ANN. §§ 17.45(9), 17.49(a) (Supp. 1976). Furthermore, if the fact finder determines that the medium has a direct or substantial interest in the dissemination of a misrepresentation, then the exemption will be inapplicable. *Id.* § 17.49(a). A "direct or substantial interest" presumably means something more than mere compensation for advertising. The medium would probably have to share in the return from the deceptive trade practice, much like a joint venturer or a partner, or perhaps even as a commissioned salesman. This limited exemption seems reasonable, for the media should not be required to guarantee the veracity of every advertisement but should be penalized for knowingly publishing false and misleading commercial statements, or for participating in a scheme to defraud the consumer.

The United States Supreme Court has held that the constitutional protection afforded to free speech does not apply to commercial advertising. *See* Valentine v. Chrestenson, 316 U.S. 52, 54 (1942). There is an excellent discussion of the difficulty in determining what is commercial advertising in Holiday Magic, Inc. v. Warren, 347 F. Supp. 20 (E.D. Wis. 1973).

37. TEX. BUS. & COMM. CODE ANN. § 17.54 (Supp. 1976); *see* Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656, 662 (Tex. Civ. App.—Amarillo 1975, no writ).

38. Section 17.54 as originally enacted provided:

> No award of damages may be given in any action filed under § 17.51 [the class action provision] if the defendant:
> (1) proves that the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid *any error*; and
> (2) made restitution of any consideration received from *any member* of the class.

Tex. Laws 1973, ch. 143, § 1, at 330 (emphasis added).

39. Section 17.54 as amended provides:

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vide that *all members* of the putative class must receive *all consideration* paid by them before the defendant may assert the bona fide error defense; additionally, the defendant must demonstrate that reasonable procedures were adopted to avoid *the* error which caused the harm.[40] It is likely that the courts will read the original Act in conformity with the 1975 amendments to avoid an effect which would clearly be adverse to the intent of the legislature, and would not protect the consumer. Thus the bona fide error defense which limits a defendant's liability to restitution is the only defense available to a defendant unable to rebut a prima facie case proven by a plaintiff.[41]

ELEMENTS OF A PRIMA FACIE CASE

The Deceptive Trade Practices Act requires the plaintiff to prove that the misrepresentation made by the defendant was material to the transaction, reliance by the plaintiff on the misrepresentation, and a resulting actual injury. There is generally no requirement that the plaintiff prove intent, knowledge, or unreasonableness of the defendant in disseminating the misrepresentation.[42] In this regard, the DTPA has fundamentally departed from common law fraud and has shifted the cost of damages caused by a misrepresentation from the consumer to the creator of the unintended deception.[43] The DTPA has also made

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No award of damages may be given in any action filed under Section 17.51 [the class action provision] of this subchapter if the defendant:

(1) proves that the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid *the error*; and

(2) made restitution of *all* consideration received from *all members* of the class, *as the court may determine and direct.*

TEX. BUS. & COMM. CODE ANN. § 17.54 (Supp. 1976) (emphasis added).

40. It is clear from the 1975 amendments that the class action must be certified before this defense can be raised so the court can exercise control over the settlement. *See generally* Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo 1975, no writ).

41. There is a more clearly worded but analogous provision in the Truth in Lending Law, 15 U.S.C. § 1640(c) (1970), which releases a creditor from liability if the violation was unintentional, and resulted from bona fide error notwithstanding the existence of procedures reasonably designed to prevent such a violation.

42. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(9), (10), (13), (17) (Supp. 1976) (contain a scienter requirement).

43. *See* Southwestern Indem. Co. v. Cimarron Ins. Co., 334 S.W.2d 831 (Tex. Civ. App.—Waco 1960), *rev'd on other grounds*, 161 Tex. 516, 344 S.W.2d 442 (1961); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 685-86 (4th ed. 1971) (list of the requisite elements under actions for common law fraud).

Because of deceptive advertising, the consumer often must spend additional time and money searching for non-defective products or maintaining and eventually replacing the defective product. *See generally* Birmingham, *The Consumer as King: The Economics of Precarious Sovereignty*, 20 CASE W. RES. L. REV. 354, 366-67 (1969); Darby &

subtle changes in certain concepts which affect the scope of liability in the common law treatment of fraud, including materiality, reliance, and privity.

Every transaction involves certain representations, their transmission, and their reception by the ultimate user. Distortion and misrepresentation are possible at each point in this process. Allocating between the representer and the ultimate user the duty to determine the truth of the matters asserted is the primary concern of the law of "product disappointment."[44] In establishing a prima facie case, the plaintiff must first establish that a misrepresentation has been made.

Misrepresentation

Section 17.46(b) of the DTPA proscribes 20 deceptive acts in nonexclusive terms. One may not, for example, "cause confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods and services,"[45] nor may one "represent that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have."[46] Through these specific proscriptions the DTPA outlaws any imaginable misrepresentation in the sale of goods and services.[47] Because those proscriptions generally do not contain any element of scienter, the importance of determining whether there has been a false representation is magnified. It is clear that under the DTPA an express representation is actionable for both physical and economic loss.[48] Further, one may now maintain a cause

Karnis, *Free Competition and the Optimal Amount of Fraud*, 16 J. LAW & ECON. 67 (1973).

44. This allocation process is well understood by the courts. *See* Denning v. Bolin Oil Co., 422 F.2d 55, 58 (10th Cir. 1970). *See also* Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. LAW & ECON. 1, 11 (1969). The law concerning product disappointment is extremely broad. There is an excellent interpretive analysis in Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1113 (1974). An analysis of specific aspects of product disappointment in the area of common law has been made in Harper & McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 941 (1938). In the securities field, refer to 3 A. BROMBERG, SECURITIES LAW: FRAUD § 12.6, at 227 (1973). In the field of deceptive practices under Section 5(a)(1) of the Federal Trade Commission Act, see E. KINTER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES (1971). In products liability, see Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

45. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(2) (Supp. 1976).

46. *Id.* § 17.46(b)(5).

47. *See id.* § 17.46(a).

48. The basic tenets of RESTATEMENT (SECOND) OF TORTS § 402A (1965) (Special Liability of Seller of Product for Physical Harm to User or Consumer); § 402B (Misrepresentation by Seller of Chattels to Consumer for Physical Harm); § 552 (Misrepre-

of action based upon implied representations, not only for resulting physical harm under an implied warranty or strict liability theory, but may also maintain an action under the Deceptive Trade Practices Act for both injuries and economic losses.[49] Moreover, the consumer may not waive his right of action under the DTPA, so the potential of the DTPA as a means to compensate for product dissatisfaction looms large.[50]

In physical injury cases the very presence of the product on the market has been taken as a representation to the consumer that the use of the item will not cause harm.[51] Where physical harm results, even specific representations of safety of one characteristic of the product have been interpreted as an implied representation of general product safety.[52] Less general representations have been required for recovery of economic loss. False representations by the manufacturer that a tractor would perform specific farm functions supported a judgment against the manufacturer upon proof that the tractor was unsuitable for such use.[53]

Specific representations need not be oral or written. One who places a house on sale at a particular price in a good neighborhood may thereby portray the house as a solid investment when in fact it is ter-

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sentation by Seller of Chattels to Consumer for Economic Harm) (Tent. Draft No. 17, 1963) effectively have been adopted by the DTPA, thus creating strict liability for economic as well as physical loss. *See* TEX. BUS. & COMM. CODE ANN. § 17.46 (Supp 1976). The extension of strict liability to misrepresentation of services is a sweeping departure from traditional strict liability coverage. *See generally* Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 SW. L.J. 575 (1974).

49. Section 17.50(b)(1) provides that the consumer who prevails may obtain three times the amount of *actual* damages. There are no other limitations on the types of harm for which the consumer may recover.

50. Section 17.42 provides that "[a]ny waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void." Nevertheless, the Act seems to prohibit only a disclaimer of liability and not an attempt to disclaim representations which would otherwise be implicit in the transaction. *See generally* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974, 1004-1016 (1966).

51. *See* Greenman v. Yuba Power Prods., Inc., 27 Cal. Rptr. 697, 701 (1963); Davis v. Van Camp Packing Co., 176 N.W. 382 (Iowa 1920).

52. *See* Stevenson v. Four Winds Travel, Inc., 462 F.2d 899 (5th Cir. 1972), where a travel agency brochure emphasized the presence of escorts and directors on certain tours, the court held the agency liable for failure to warn of a slippery condition during the tour. In Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970) sunglasses which were advertised as baseball glasses that would give "instant eye protection" shattered when hit, causing the loss of plaintiff's eye. The defendant was held liable for breach of an implied warranty of fitness even though the manufacturer apparently was referring to eye protection from the sun.

53. Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966).

mite infested.[54] Perhaps, at some point, the calming reassurance of a doctor or the calculated atmosphere of security in a lawyer's office, the implication or representation of safety or good work is so attenuated that the courts will probably not find a basis for a cause of action under the DTPA.[55] Thus the analysis of whether a representation exists must involve a sophisticated study of the portrayal of the product, including the totality of the circumstances surrounding the representer's communication with the consumer.[56] The benign speculation or "puff" about the performance of a good or service in a passing conversation may not have the same legal effect as that same statement made in a more serious business context or when repeated many times on television or radio.[57] Hence, at trial, the consumer in a deceptive trade practices action will try to recreate the innuendo and illusion as well as the more significant statements or advertisements which demonstrate that the defendant did falsely portray the product. The defendant, on the other hand, will be attempting to color in the background and correct misconceptions about the language and allusions actually used so that when the picture is completed the jury will find that the product was portrayed in an accurate, or at least neutral, light.

Two considerations will weigh heavily in the determination of whether there has been a representation. First, the warnings and disclaimers contained in the product advertising will be analyzed to determine whether they effectively neutralize spurious and inaccurate portrayals of the product.[58] Where the warnings or disclosures are in-

54. Swinton v. Whitinsville Sav. Bank, 42 N.E.2d 808 (Mass. 1942).

55. Professor Shapo discusses representations at various levels of abstraction, ranging from specific claims through written or verbal communications to general claims about the product's capabilities expressed through those same channels. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1113, 1325-34 (1974).

56. *Id.* at 1370. Factors which should be carefully considered are the age, sex, race, language, and intellect of the consumer, as well as the sophistication and subtlety of the representation.

57. The classic statement on "puffing" was made by Justice Holmes, in Deming v. Darling, 20 N.E. 107 (Mass. 1889) where he said:

> It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion,—which do not imply untrue assertions concerning matters of direct observation . . . and as to which 'it always has been understood, the world over, that such statements are to be distrusted'. . . .

Id. at 108. *But see* Loe v. McHargue, 394 S.W.2d 475 (Ark. 1965).

58. While the words of TEX. BUS. & COMM. CODE ANN. § 17.42 (Supp. 1976) prohibit any waiver of the provisions of the Act, it is clear that the representer may attempt to clarify the representations by disclaiming those representations which he does not intend to make. On the other hand, the representer may not attempt to disclaim liability for those representations which are generated.

complete or are less forcefully or intelligibly worded than the inaccurate portrayals of the product, the courts will readily find a misrepresentation.[59]

Second, the express wording of the DTPA adopts the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act.[60] Section 5 (a)(1) prohibits the use of "unfair methods of competition in commerce" and "unfair or deceptive acts or practices in commerce."[61] Its thrust is to identify with particularity those terms or classes of products which tend to deceive, and to require specific actions to fulfill the expectation generated by those terms. The DTPA, while encompassing the policies and interpretations of section 5(a)(1), is not limited to

59. *See* Whittington v. Eli Lilly & Co., 333 F. Supp. 98 (S.D.W. Va. 1971); Ducote v. Chevron Chem. Co., 227 So. 2d 601, 604 (La. App. 1969); Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEXAS L. REV. 1 (1936).

60. TEX. BUS. & COMM. CODE ANN. § 17.46(c) (Supp. 1976). It is uncertain just how the courts will treat this provision. The legislature has clearly codified its legislative intent, that the provisions of the DTPA should be construed similar to those in the Federal Trade Commission Act. If this is read to be a legislative attempt to mandate a course of decision to the courts, it is not constitutional. By applying a separation of powers argument, it is probable that the courts will declare that the legislature cannot command a specific construction and thereby bind the Texas courts to precedents set in another jurisdiction. It is likely, however, that Texas courts will use federal cases to guide and support their decisions because of the legislative intent. Thus in most instances the results will be the same, although the courts will be free to delimit the DTPA in their own way should they not agree with the result reached by a federal court in a similar case.

61. 15 U.S.C. § 45(a)(1) (1970). Of the substantial body of law which has developed under section 5(a)(1), two areas are significant for the purposes of determining what constitutes a representation. First, through FTC and federal court interpretations certain words and phrases have become words of art which are deemed to connote specific ideas or clusters of ideas. For example, the word "free" has evolved to mean an unconditional gift except where the conditions which are a prerequisite to the offer or retention of the gift are clearly set forth at the outset. 16 C.F.R. § 251.1 (1975). The term "institute" cannot be used unless it is used to identify an organization for study having a staff of competent, experienced, and qualified educators. FTC Stipulation 7522, 2 TRADE REG. REP. ¶ 7577.383 (1971). Similarly, an advertiser can use the word "award," as in "award winning product," only if there has been a contest actually conducted by impartial and qualified individuals. FTC Stipulation 8642, 2 TRADE REG. REP. ¶ 7685.18 (1971). Finally, "test" constitutes an improper representation unless "practical tests were made under controlled conditions." FTC Stipulation 8796, 2 TRADE REG. REP. ¶ 7865.96 (1971).

The second category of section 5(a)(1) interpretations involves the disclosure requirements of the FTC. For example, specific disclosure is required where the composition of a product is changed, or when the appearance of a product does not adequately warn the consumer of its composition. *See* W.M.R. Watch Case Corp. v. FTC, 343 F.2d 302 (D.C. Cir.), *cert. denied*, 381 U.S. 936 (1965) (watch company must disclose that watch cases are plated rather than solid gold). Similarly, former titles of books or the fact that a book has been abridged must be disclosed or its sale will constitute a misrepresentation. Bantam Books, Inc. v. FTC, 275 F.2d 680 (2d Cir. 1960).

that section, but instead contemplates the viewing of the total context of product portrayal to determine whether there has been a false representation.

Materiality

Once a misrepresentation is found, an action under common law fraud or even the Federal Trade Commission Act can be maintained only if it is established that the misrepresentation is significant or material to the transaction. Trivial distortions in market information are overlooked and liability is often avoided by the application of an objective test which determines whether a reasonable man in the same circumstances would have found the representation to be material. A fact is material if it was significant in the decision to purchase or, by implication, to purchase at a particular price.

It is unclear whether the Deceptive Trade Practices Act retains the requirement of materiality. Certainly the words of the Act contain nothing resembling section 2 of rule 10b-5, which expressly incorporates materiality as an element,[62] nor do the three reported cases which have construed the DTPA thus far adopt the common law requirement of materiality.[63] The DTPA instead simply enumerates a list of false and misleading practices which if proven could be considered deceptive per se.[64] Interpreting language analogous to that of the DTPA, however, courts construing the Lanham Trademark Act[65] have held that the plaintiff must demonstrate that the defendant's advertisement is a false representation of fact, that actually deceives or has the tendency to deceive a substantial segment of its audience, that the deception is likely to influence the purchasing decision, and that the particular plaintiff has been or is likely to be injured by the deception.[66] In short, courts incorporate materiality as an element into lan-

62. Rule 10b-5 provides that "[i]t shall be unlawful . . . to make any untrue statement of a material fact . . . ." 17 C.F.R. § 240.10b-5(2) (1975).

63. Bourland v. State, 528 S.W.2d 350 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo 1975, no writ); Credit Bureau, Inc. v. State, 515 S.W.2d 706 (Tex. Civ. App.—San Antonio 1974), *aff'd*, 530 S.W.2d 288 (Tex. 1975).

64. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(1 to 20) (Supp. 1976).

65. 15 U.S.C. § 1125(a) (1970) provides:

> Any person who shall affix . . . or use in connection with any goods or services . . . any false description or representation . . . and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such . . . cause . . . the same to be transported or used in commerce . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

66. There is a discussion of the case development in this area in Weil, *Protectibility*

guage which seems to leave no room for it. Because of the central role materiality plays in screening out trivial and insignificant representations and in allocating responsibility between the representer and the consumer, it must be presumed that the intent of the legislature was to include a materiality requirement. Although interpreting only equitable governmental enforcement actions under the Federal Trade Commission Act rather than actions for damages, the courts and the FTC have consistently held that the government must at least prove the "capacity to deceive."[67] Thus, materiality, although not mentioned in the literal language of the DTPA, seems to be an inherent element: After a false representation is shown to exist, it serves as a threshold issue in the plaintiff's prima facie case. Materiality under the DTPA can be proved by submitting the alleged misrepresentations to the finder of fact along with the circumstances surrounding its dissemination. If it is found that the representation would have caused a reasonable buyer to purchase the product then the representation would be material.[68]

Justifiable Reliance

Whether the consumer justifiably relied upon the misrepresentation is the correlative concept to materiality. Just as the materiality concept serves to screen out trivial and insignificant misrepresentations, the concept of reliance focuses upon the significance of the misrepresentation and whether it in fact caused the alleged injury. The determination of whether the reliance was justifiable provides a means to allocate between the representer and the ultimate receiver the duty to ascertain the veracity of the representer's assertions. Unlike materiality, the test for justifiable reliance is subjective and turns on whether the representee had knowledge of the inaccuracy of the contested assertion.[69]

of Trademark Values Against False Competitive Advertising, 44 CAL. L. REV. 527 (1956). *See generally* Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act,* 76 YALE L.J. 485, 489-90 (1967).

67. *See* American Life & Accident Ins. Co. v. FTC, 255 F.2d 289, 293 (8th Cir. 1958); Goodman v. FTC, 244 F.2d 584, 604 (9th Cir. 1957). *See also* Westware, Inc. v. State, 488 S.W.2d 848 (Tex. Civ. App.—Austin 1972, no writ).

68. While the following cases were governmental enforcement actions rather than actions for damages, they demonstrate how "materiality" is proved: Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961); Zenith Radio Corp. v. FTC, 143 F.2d 29 (7th Cir. 1944).

69. For a general discussion of the common law right to justifiably rely on misrepresentations, see Keeton, *Actionable Misrepresentation: Legal Fault As a Requirement, I. Some General Observations,* 1 OKLA. L. REV. 21, 23 (1948); Keeton, *Actionable Misrepresentation: Legal Fault As a Requirement, II. Recission,* 2 OKLA. L. REV. 56, 66 (1949). *See generally* Harper & McNeely, *A Synthesis of the Law of Misrepresenta-*

As previously noted, section 17.50(a) requires that the consumer must be "adversely affected by" a violation of the Act to have standing. In other words, the misrepresentation must cause the adverse effect. Thus it is arguable that the justifiability of the reliance is an implicit part of the Act, for if the consumer unjustifiably relies, either because of ignorance, neglect, or willfulness, that factor rather than the unlawful representation itself would be the cause for the purchase and its ultimate adverse effect.

In order to establish the necessary causal connection, the consumer will have to prove that he was improperly motivated to purchase a good or service which caused some harm. Where there is a direct or personal relationship between a buyer and a seller who have equal bargaining power, however, the concept of justifiable reliance would serve to distribute between the two, equal responsibility for determining the truth of matters asserted.[70] But the justifiable reliance standard may lose independent significance where there is a complex product or service, and the consumer lacks the capacity to test the advertiser's assertions. In such cases, the courts will require only that the plaintiff act as a reasonable consumer would under the circumstances. Thus in many cases the materiality and justifiable reliance standards will become the same.

A merger of these standards may occur in private class actions and Attorney General suits.[71] The Act uses similar causation language, but because of the large number of consumers in these suits and because they often deal with complicated products which have been advertised on a massive scale, the concept of justifiable reliance tends to become objective. It in fact is reduced to a consideration of materiality.[72] Both

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tion, 22 MINN. L. REV. 939, 955-1006 (1938). Justifiable reliance has been carried over as a necessary element in 10b-5 actions. *See* List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), *cert. denied,* 382 U.S. 811 (1965); Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5,* 88 HARV. L. REV. 584 (1975).

70. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment,* 60 VA. L. REV. 1113, 1364 (1974).

71. TEX. BUS. & COMM. CODE ANN. § 17.51(a) (Supp. 1976). The private class action section, provides "[i]f the unlawful act or practice *has caused* damage to the other consumers . . . ." and regarding the Attorney General's suits, § 17.47(d) provides that "[t]he court may make such additional orders or judgments as are necessary to compensate identifiable persons for actual damages . . . which may have been acquired by *means of any act* . . . restrained." (emphasis added).

72. This would especially seem to be the case where the representer failed to disclose a material characteristic. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5,* 88 HARV. L. REV. 584 (1975).

causation and the distribution of the responsibility to investigate the truth of the misrepresentation become more abstract, and the inquiry focuses on the question of whether a reasonable man in the same circumstances would have been justified in relying on the misrepresentation.

Thus under the DTPA, the consumer must first demonstrate that the defendant misrepresented a good or service either directly, by indicating the product possessed certain non-existent characteristics, or indirectly by allowing past representations to stand uncorrected. Second, the consumer must prove that those representations were material or that a reasonable man in the same circumstances would have been affected by them. Finally, the plaintiff must show that these representations were relied upon by him and that such reliance was justifiable under the circumstances.

SCIENTER AND STRICT LIABILITY

The care which the law seeks to encourage in the dissemination of information has been strongly influenced by the mental attitude of the representer. Certainly it seems that one who intentionally misrepresents something should be punished more harshly than one who, although using all reasonable care to disseminate information, still generates information less than truthful.

The common law originally reacted to the intentional misrepresentation by applying both criminal and civil sanctions to it.[73] An honest mistake, on the other hand, would void the transaction only where there was a contractual or warranty relationship.[74] Though dealing with misrepresentations, neither of these approaches resolved the tradi-

73. Criminal sanctions for consumer fraud developed slowly. The thirteenth century English courts, for instance, generally had "no remedy for the man who to his damage has trusted the word of a liar." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 535 (2d ed. 1923). Even in the eighteenth century, a British Chief Justice could rhetorically ask: "When A got money from B by pretending that C has sent for it, shall we indict one man for making a fool of another?" H. MANNHEIM, CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION 121 (1946). It was not until 1757 that a statutory provision for punishment of "mere private cheating" was provided in English law. False Pretenses Act, 30 Geo. 2, c. 24 (1757). *See generally* Egen, *Criminal Economic Law and Consumer Protection*, 1967 J. BUS. L. 26; Ogren, *The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White Collar Crime*, 11 AM. CRIM. L. REV. 959, 985 (1973). The development of civil liability is traced in W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 683-89 (4th ed. 1971).

74. Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 418-23 (1911) (discussion of the development of liability for breach of warranty).

tional consumer problem of supplying a remedy for an honest misrepresentation where there was no contractual or warranty relationship between the parties; it was the consumer's lot to bear this type of misrepresentation under the rubric caveat emptor. But first in securities law and then in products liability cases involving physical injuries, the courts rejected the caveat emptor doctrine and placed a duty upon the seller to represent his good or service accurately.[75]

The Deceptive Trade Practices Act completes the erosion of the doctrine of caveat emptor in Texas by creating strict liability for any material misrepresentation in the sale of goods and services. Except for a few situations, one who uses "false, misleading or deceptive trade practices in the conduct of any trade or commerce" is liable for at least actual damages without regard to the representer's intent, knowledge or reasonableness, even in non-privity transactions.[76] In certain specifically enumerated deceptive trade practices, the legislature included intent elements, ostensibly to restrict the scope of liability for violations of those proscriptions. Just as clearly, the legislature failed to include scienter elements in the remainder of the deceptive acts listed. Thus by selectively incorporating the intent element for particular violations, the legislature has rationally designated those deceptive acts which are to give rise to strict liability and those which are to retain the common law intent element. Further, section 17.54 allows the defense of reasonable error but only if restitution is made to all those in the plaintiff class who were harmed by the misrepresentation.[77] By considering a reasonableness standard in this section and coupling it with restitution, the legislature seems to have considered negligence or unreasonable

75. *See, e.g.*, SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963) (securities law); Putman v. Erie City Mfg. Co., 338 F.2d 911, 912-13 (5th Cir. 1964) (products liability); Associated Sec. Corp. v. SEC, 293 F.2d 738, 740-41 (10th Cir. 1961) (securities law); SEC v. Gulf Intercontinental Fin. Corp., 223 F. Supp. 987, 996 (S.D. Fla. 1963) (securities law); George v. William, 379 P.2d 103, 105-106 (Alas. 1963) (products liability). *See generally* 3 A. BROMBERG, SECURITIES LAW: FRAUD § 12.5, at 275 (1973); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

76. TEX. BUS. & COMM. CODE ANN. § 17.46(a) (Supp. 1976). Only in § 17.46(b) (9), (10), (13), (17) are there specific intent elements.

77. By providing the bona fide error defense to treble damage class actions, the legislature may be attempting to avoid the judicial interpretation placed on the Truth in Lending Act, 15 U.S.C. § 1640(c) (1970), under which its enforcement provisions were limited to individual private actions. Many federal courts found that the private action with its statutorily prescribed liquidated damages and reasonable attorneys' fees was far superior to the class action with its potential "annihilating effect." Ratner v. Chemical Bank, 54 F.R.D. 412 (S.D.N.Y. 1972). *But see*, Eovaldi v. First Nat'l Bank, 57 F.R.D. 545 (N.D.N.H. 1972).

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care in the dissemination of information as a scienter requirement but chose to reject it in favor of strict liability in all but the class action.

To the extent that strict liability is applicable, the DTPA will tend to achieve five objectives: (1) compensating the victim of consumer fraud; (2) spreading the loss caused by misinformation over the entire consuming society; (3) shifting the burden of consumer dissatisfaction to those who are better able to afford it; (4) reducing the confusion as to who is liable and thereby reducing the transaction costs of each loss; and (5) forcing business to affirmatively seek to disseminate usable and correct information. For example, shifting the risk of incorrect information from the consumer to the representer spreads the cost of the honest mistake over the entire market, and should encourage the representer to investigate and test the veracity of the representations which are made. In a sense, the representer becomes the insurer of correct information in the marketplace. Regrettably, this approach may have the adverse effect of causing the consumer to be careless or even reckless in his purchasing habits. The courts will probably counter this result, however, by emphasizing the extent to which reliance by the victim may be justified in each case.

By its substantial removal of scienter requirements, the DTPA has increased the number of those potentially liable for a deceptive trade practice. Under common law fraud, since the defendant is required to have a specific intent to deceive, only those intimately involved with the deceptive practices are liable.[78] But under the DTPA, because there is generally no scienter requirement, a defendant can be far removed from an actual scheme to deceive and still be subject to liability. The remoteness of the defendant's actions which will result in their being considered benign is a question which remains for the courts. It is likely that limitations will be developed from the elements of materiality and reliance, and will focus upon the issue of whether the defendant's actions caused the consumer's injury.[79]

78. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 107, at 700 (4th ed. 1971).

79. *See* Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968), *aff'd*, 430 F.2d 1202 (9th Cir. 1970), where the trial court found a housewife uncommonly able to invest and therefore held that she did not justifiably rely on the misrepresentation, or in other words, that the representation did not cause the injury.

In Bourland v. State, 528 S.W.2d 350 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), the court struggled with the issue of whether liability should be extended to an attorney who was in close association with a land fraud scheme. The court reasoned that "Art. 17.41 . . . requires proof of an agreement to obtain property from others by engaging in a course of conduct which the parties know has a tendency or capacity to deceive." *Id.* at 355. If *Bourland* is read to require knowledge or scienter then it is improperly de-

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In accordance with the DTPA's purpose to protect consumers there is the further limiting feature that misrepresentation of a service is actionable under the Act only if it was rendered for a non-commercial use. Presumably, a service of a commercial nature will retain its immunity even when a consumer later receives the service for a non-commercial use. Thus deceptive accounting services provided by an accounting firm to another business which ultimately uses this work product to sell securities would not be actionable by the individual securities purchaser, because the accounting services were first rendered for a commercial or business use. Of course, the immunity of the accounting services alone would not insulate those selling the securities who may themselves be liable for misrepresentation under the DTPA. In comparison, there is no "business use" limitation on the sale of goods. Hence a manufacturer who misrepresents goods and then distributes them through wholesalers and retailers to the consumer would remain liable to the consumer even though the original sale between the manufacturer and the wholesaler was purely a "business use" transaction.

In summary, the broad liability for a deceptive trade practice which is seemingly created by abolishing the scienter requirement will probably be limited by two concepts. First, the action by the defendant must be shown to be the proximate cause of the injury, and the plaintiff must have justifiably relied upon the defendant's actions. If the defendant is acting in concert with others in creating the deceptive practice, the total scheme of the group will be considered in determining the significance of the conduct which caused the injury. If he is

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cided because it does not appear that the DTPA requires that element. But if *Bourland* is read to allow the trial court to view intent or knowledge as one manifestation of the causal connection between the defendant's actions and the ultimate harm to the victim, then it was correctly decided.

Professor Bromberg advances a similar analysis for rule 10b-5 actions which emphasizes the different levels of activity by the defendant. According to his model the parties involved are the participant or manager of the fraudulent scheme, the participant's agents or aidor-abettors, and finally the conspirator who manages a separate but economically integrated operation. 2 A. BROMBERG, SECURITIES LAW: FRAUD § 8.5, at 208.5 (1973). Although this model provides a conceptual tool to determine who is associated with the scheme, the relative position of the defendant will have no effect on the ultimate liability of the defendant under the present structure of the DTPA. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 79, at 517 (4th ed. 1971) for a discussion of the traditional means of limiting damages from strict liability occurrences. For a well reasoned exposition of the justifiable reliance limiting concept, see Keeton, *The Ambit of a Fraudulent Representer's Responsibility*, 17 TEXAS L. REV. 1 (1938). In any case, *Bourland* is merely the beginning of the struggle to develop workable limitations on liability.

acting alone, only the individual's conduct which contributed to the deceptive trade practice will be considered. Second, when the subject matter of the suit is a service, the DTPA seems to limit those who can be considered as contributing factors to those who have rendered services for a non-business use.

REMEDIES AND ATTORNEYS' FEES

In addition to abolishing scienter and increasing the scope of liability for misrepresentations, the Deceptive Trade Practices Act has clearly gone beyond the common law by providing for recovery of treble damages and attorneys' fees, as well as conferring extensive powers on receivers appointed under the Act.[80] Because of the potential for large awards, the Act provides an incentive to bring securities, consumer fraud, and products liability cases under the DTPA.[81] Thus courts at both the federal and state levels will hear cases in which it is necessary to determine the appropriate measure of damages and attorneys' fees under the Act.

The injured private litigant has a cause of action either as an individual or as part of a class.[82] In either of these capacities the consumer, at the discretion of the court, is entitled to treble damages. Although there are as yet no specific guidelines or cases discussing when treble damages should be granted under the DTPA, at least four criteria have been used in other contexts for the purpose of assessing damages against or punishing those who deceive the consumer. First, the deterrent effect of the imposition of treble damages on the defendant should be examined.[83] Where he has made an isolated, honest mistake and the court is assured that the misleading or deceptive trade practice will not be continued or repeated, there is little purpose to be served by awarding punitive damages.[84] The burden of clearly proving these

80. TEX. BUS. & COMM. CODE ANN. §§ 17.50(b)(1), 17.59 (Supp. 1976).

81. In securities cases, the DTPA will probably be pled alternatively to rule 10b-5 violations, for the proof necessary under rule 10b-5 exceeds that required under the DTPA.

82. *See* TEX. BUS. & COMM. CODE ANN. §§ 17.50(b)(1), 17.51(a) (Supp. 1976) which allow consumers in a class action as defined by requirements almost identical to FED. R. CIV. P. 23 to recover "damages and relief as provided in this subchapter," presumably including treble damages. *See generally* Comment, *The Texas Consumer Class Action*, 16 S. TEX. L.J. 111 (1974).

83. *See* Bootle, *Sentencing the Fraudulent Offender: The Basic Problem, Sentencing Institute and Joint Council for the Fifth Circuit*, 30 F.R.D. 185, 287 (1962).

84. In fact, such award may actually increase the problem of product disappointment. *See* Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J. LAW & ECON. 329, 335 (1974).

factors, however, should be placed squarely upon the defendant before the presumption in favor of multiple damages should be rebutted. Second, treble damages supply a means to compensate the plaintiff for time expended in litigating the claim. Clearly, the legislature intended to provide an effective remedy to the small consumer. Any expense incurred by the plaintiff, apart from court costs and attorneys' fees, should be borne by the defendant rather than set off against the consumer's small recovery.[85] Third, the court should investigate the deterrent effect of the award on others.[86] Multiple damages should be awarded not only to deter the defendant sued, but also to discourage others similarly situated from engaging in deceptive trade practices. Finally, treble damages should be awarded to the tenacious litigant as bounty so as to encourage consumer fraud suits, and in this way to further increase the deterrent effect of the statute.[87]

The private litigant is also normally entitled to reasonable attorneys' fees.[88] Thus, in addition to being given a right to sue if deceived, poor and middle income plaintiffs are also provided with legal aid and hence have ready access to the courts to vindicate their rights under the DTPA.

Both the plaintiff and his attorney should be provided with proper recompense for bringing an action which vindicated damage to the public.[89] Reasonable attorneys' fees measured by the amount of effort expended on the suit serve this purpose. Unlike most statutes of this type, the DTPA requires the courts to look to the effort expended by the attorney rather than to the recovery finally achieved by the attorney on the plaintiff's behalf.[90] This will have the salutary effect of en-

85. *See generally* Comment, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection,* 114 U. PA. L. REV. 395, 409 (1966).

86. *See generally* Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis,* 86 HARV. L. REV. 693, 708-13 (1973).

87. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.5, at 346-47 (1973).

88. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976). *See also id.* § 17.50(c), which allows the defendant to receive attorneys' fees upon a showing that the consumer action was brought in bad faith.

89. For a clear discussion of a similar justification in antitrust class suits, see Freeman, *Attorneys' Fees: A Search for a Rule of Reason,* 38 ANTITRUST L.J. 721 (1969). *See generally* Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest,* 24 HASTINGS L.J. 733 (1973).

90. TEX. BUS. & COMM. CODE ANN. § 17.50(c) (Supp. 1976); *see* ALAS. STAT. § 09.60.010 (1973), authorizing the establishment of ALAS. R. CIV. P. 82(a) which provides a percentage formula to estimate the recovery of attorneys' fees. One effect of measuring attorneys' fees by the effort expended rather than the recovery awarded will be to increase the risk to a defendant using repressive discovery tactics in order to coerce settlement by the nominal consumer plaintiff.

couraging the private bar to take relatively small claims, where an estimation of the effort expended would yield a higher fee than would a contingency fee, but may have the opposite effect in large class action or products liability cases where contingent fees normally would be quite high in successful cases. As the award of fees based on the effort of the attorney is discretionary with the court, however, it would be in keeping with the intent of the DTPA to provide for attorneys' fees measured against a percentage of the recovery where such is necessary to encourage proper representation.[91] In any case, the DTPA should be construed to give the courts discretion to award attorneys' fees in light of both the quality and quantity of the work product produced. Certainly, to encourage consumer suits with their resultant deterrent effects, and to encourage quality legal representation in vindicating public injuries, the courts should be generous in their awards of attorneys' fees.[92]

To further the chances of the consumer satisfying his claims, the DTPA provides that the court in its discretion may appoint a receiver to manage the defendant enterprise.[93] With the court's approval, the receiver may liquidate the defendant's assets and distribute them to consumers who demonstrate proof of their out-of-pocket losses.[94] Moreover, once these funds are expended the court may order that all persons, who knowingly contributed anything of value to the firm with the expectation of receiving profits from the enterprise, be held jointly

91. *See* City of Detroit v. Grimnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 382 F. Supp. 999 (E.D. Pa. 1974).

92. If the Texas experience under the general attorneys' fees statute, TEX. REV. CIV. STAT. ANN. art. 2226 (1971) is any indication of the willingness of Texas courts to award them, the prospect for recovery under the DTPA is not very great. *See* Tenneco Oil Co. v. Padre Drilling Co., 453 S.W.2d 814, 817-21 (Tex. 1970). Generally, the courts have placed a very strict construction on article 2226. *See* Warburton, *Coin Albatross Tool: Attorneys' Fees Allowances*, 31 TEX. B.J. 909, 910 (1968). In contrast to the specific wording of article 2226, however, TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976) provides no specific guidelines for the recovery of attorneys' fees. Since the DTPA requires that "each consumer who prevails *may* obtain . . . attorneys' fees reasonable in relation to the amount of work expended," (emphasis added) the award of some amount is probably required, though the amount, based on a determination of reasonableness, is left to the discretion of the judge or jury. *See* Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo 1975, no writ). *See generally* Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973).

93. TEX. BUS. & COMM. CODE ANN. § 17.59(a) (Supp. 1976). *See also* 11 U.S.C. § 35(a)(2) (1970) which further aids consumers by making all claims based upon misrepresentation non-dischargeable and capable of surviving bankruptcy proceedings.

94. TEX. BUS. & COMM. CODE ANN. § 17.59(a) (Supp. 1976).

and severally liable for any unsatisfied consumer claims.[95] By specifically including credit as a thing of substantial value, the legislature has extended liability to lending institutions which either know of the unlawful deception or should know of it.[96] Arguably, however, a lending institution which merely buys discounted commercial paper from the defendant or simply charges interest on an outstanding loan is not technically sharing in the profits of the defendant's enterprise. Yet, given the fact that the lending institution actually has knowledge or constructive knowledge of the unlawful acts of its debtor and given the express requirement to protect the consumer, the courts will probably not allow the form of the profit sharing to compel the conclusion that the lending institution is actively participating in an enterprise which is bilking the consumer. Therefore, in those cases liability will probably be extended to the lending institution despite the holder in due course doctrine.[97]

Conclusion

Notwithstanding the dearth of cases construing either the Texas Act or others similar to it, a close reading of the Deceptive Trade Practices Act provides an insight into the difficulties which it may create in the future. While the legislature has expanded the standing granted to the consumer to prosecute for deceptive acts in real estate and in those goods which are leased as well as bought, the amended DTPA does not clarify when a consumer purchases a good for his "use," or when that consumer is "affected by" a deceptive act. Moreover, difficult questions of the extent of the business use limitation on the scope of coverage of services and the range of those who may be liable under the Act remain unanswered by the 1975 amendments. Additionally, because attorneys' fees and damages will be awarded under the DTPA, sensitive questions of whether treble damages should be awarded and how to measure the value of attorneys' efforts must be answered. Even the most liberal reading of the Act will probably not cure all of its

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95. *Id.* § 17.59(b).

96. *See id.* § 17.59(b)(2).

97. Compare Riley v. First State Bank, 469 S.W.2d 812, 816 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.), where the court held that a holder in due course must have actual knowledge of the wrongdoing in the making of the note with TEX. BUS. & COMM. CODE ANN. § 17.59 (Supp. 1976), which creates liability for issuing credit in those situations where the lender knows or should know that the credit is used to perpetrate fraud on the consumer.

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points of ambiguity and inconsistency; thus in the end the legislature will have to act to correct those deficiencies.

More particularly, the legislature should reconsider the scope of persons liable under the Act and attempt to formulate a workable limitation on liability. In an analogous area, the developing rule 10b-5 limitation on liability requires that the representer have actual or constructive knowledge of the falsity of the representation. This standard is an appropriate limiting device for the DTPA. Without significantly increasing the difficulty of the consumer's burden of proof, liability would be limited to those who would have access to the correct information, and thus ostensibly would be capable of correcting the misrepresentation before it was transmitted. Hence, while the DTPA is a giant step forward toward providing adequate consumer protection in Texas, the uncertainty as to what subject matter is covered and who is liable under the Act will probably slow its development as an effective enforcement and compensatory tool.

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