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## Introduction Introduction.

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# ST. MARY'S LAW JOURNAL

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## INTRODUCTION

JOHN L. HILL\*

I was very pleased to be asked to write the introduction to this issue of the *Journal*, since what now has become known as consumer law has been an area of personal interest and concern to me both as a trial lawyer in private practice and as attorney general.

My private practice was primarily what is commonly referred to as a "plaintiff's practice"—that is, I represented persons injured by another's conduct in suits for damages. While most of my cases dealt with claims of personal injury, I was frequently asked, either by clients whom I was already representing in a personal injury action or by persons seeking legal assistance from me for the first time, to help them in what would now be called a "consumer case." The actual facts of each of these cases are not important here. What is important, however, is that each had a common characteristic—the amount in controversy was generally very small, normally not more than two hundred dollars. These losses were simply too small to justify the costs of litigation.<sup>1</sup> Although the common law of fraud permitted an award of "exemplary damages" over and above actual damages,<sup>2</sup> most cases did not involve the element of intentional deception that had to be shown before exemplary damages could be awarded. Furthermore, if exemplary damages

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1. For discussions of the inhibiting effect of cost on consumer litigation see D. AAKER & G. DAY, *CONSUMERISM: SEARCH FOR THE CONSUMER INTEREST* 363-65 (1974); D. CAPLOVITZ, *THE POOR PAY MORE* (1967); P. WALD, *LAW AND POVERTY: 1965* at 59-62 (1965); Comment, *Translating Sympathy for Deceived into Effective Program for Protection*, 114 U. PA. L. REV. 395, 403 (1966).

2. See *Gale v. Spriggs*, 346 S.W.2d 620, 625 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.).

were found not to be "reasonable" in relation to the plaintiff's actual damages, the judge would order remittitur of the "excessive" amount to the defendant.<sup>3</sup>

The imbalance between litigation costs and potential recovery was not the only factor that made common law remedies ineffective. First, an action for fraud required rigorous proof: a *material* misrepresentation of *fact* upon which the plaintiff *reasonably relied* to his detriment.<sup>4</sup> A plaintiff could stumble over any one of these proof hurdles and be denied relief. Further, as noted above, proof of "intent to deceive" was required for an award of exemplary damages. Proving up a state of mind—even with strong direct evidence—is painfully difficult. Finally, the defense of "puffing" or "dealer talk"<sup>5</sup> which, in the words of Dean Prosser, allowed a salesman "to lie his head off, so long as he [said] nothing specific,"<sup>6</sup> constituted a major hurdle to success.

Contract law was no better, since by artful construction of printed contract clauses the seller could so limit the buyer's remedies as to rule out effective court action.<sup>7</sup> The only stopgap for this practice was the doctrine of unconscionability,<sup>8</sup> which permitted a court to void a patently unreasonable contract clause. Unfortunately, the doctrine of unconscionability was available only as a *defense* and not as an affirmative cause of action. Few consumer debtors would risk defending an action in the hope that their contracts would be declared "unconscionable," and again, the costs of asserting the defense made it all but illusory.

Because of these two problems—proof requirements and litigation costs—I was forced to turn down many cases even though they were meritorious. Turning down these cases was made even more difficult for me since there was virtually no place to send these aggrieved consumers for help. The Federal Trade Commission, until recently,<sup>9</sup>

3. *Irwin v. Whirley*, 538 S.W.2d 150, 153 (Tex. Civ. App.—Waco 1976, no writ).

4. *See, e.g., McCall v. Trucks, Inc.*, 535 S.W.2d 791, 794 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); *Brady v. Johnson*, 512 S.W.2d 359 (Tex. Civ. App.—Austin 1974, no writ).

5. *See, e.g., Saunders v. Martin*, 390 S.W.2d 513, 515 (Tex. Civ. App.—Texarkana 1965, no writ); 25 TEX. JUR. 2d *Fraud and Deceit* § 47 (1961).

6. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 109, at 723 (4th ed. 1971).

7. The UCC permits both the exclusion or modification of warranties and the modification or limitation of remedies. TEX. BUS. & COMM. CODE ANN. §§ 2.316, .719 (Tex. UCC 1968); Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEXAS L. REV. 60 (1974).

8. *See* TEX. BUS. & COMM. CODE ANN. § 2.302 (Tex. UCC 1968). *See generally* G. KEETON & L. SHERIDAN, *EQUITY* 227-30 (1976).

9. The Magnuson-Moss Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975), amended

could initially issue only an administrative cease and desist order and then only after a lengthy administrative hearing and possible appeal.<sup>10</sup> Furthermore, the Commission was, and still is, generally interested in bringing legal or administrative action where there are numerous consumers affected by the allegedly unlawful practice.<sup>11</sup> Many one-time consumer abuses do not reach this threshold.

State enforcement machinery was likewise inadequate. The first "deceptive trade practices act" was passed in 1967 as part of legislation dealing principally with consumer credit.<sup>12</sup> Thirteen specific acts or practices were declared unlawful, and the Consumer Credit Commissioner was authorized to request the attorney general to seek injunctions.<sup>13</sup> The statute also provided for civil penalties of one thousand dollars per violation but only for violation of an injunction.<sup>14</sup> A broad exemption provision immunized any "actions or transactions permitted under laws administered by a public official acting under statutory authority of this State or the United States."<sup>15</sup> No provision for, or mention of, private remedies was made.

This legislation was amended in 1969 in several significant ways.<sup>16</sup> First, a general prohibition of all "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade and commerce" was added to the thirteen specifically prohibited practices, and Texas courts were directed to Federal Trade Commission and federal court interpretations of section 5 (a)(1) of the Federal Trade Commission Act for guidance

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the Federal Trade Commission Act, 15 U.S.C. § 45(a) (Supp. V 1975), to permit the FTC to sue for civil penalties where the violation of the FTC rule in question was committed "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that [the violative conduct] is unfair or deceptive and is prohibited by [the] rule [in question]." *Id.* § 45(m)(1)(A). The Act also provided that knowing violators of cease and desist orders could be sued for civil penalties even though they were not formally subject to the cease and desist order in question. *Id.* § 45(m)(1)(B).

10. Civil penalties of \$5,000 were only available against those who violated cease and desist orders issued against them. 15 U.S.C. § 45(1) (1970).

11. Importantly, the Magnuson-Moss Act amended the Federal Trade Commission Act to expand the FTC's jurisdiction from acts or practices "in" interstate commerce to those "in or affecting" interstate commerce. 15 U.S.C. §§ 45, 45(a)(1), 46, 52 (Supp. V 1975). Still, Commission action must be predicated on the substantial effect the act or practice in question has on the public interest. *FTC v. Raladam Co.*, 283 U.S. 643, 646-47 (1931); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); 2 G. ROSDEN & P. ROSDEN, *THE LAW OF ADVERTISING* § 34.02[2][b] (1976).

12. *Tex. Laws* 1967, ch. 274, § 2 at 608, 658.

13. *Id.* at 658-59.

14. *Id.* at 659.

15. *Id.* at 658.

16. *Tex. Laws* 1969, ch. 452, § 1, at 1504.

in construing the general prohibition.<sup>17</sup> Second, prelitigation investigative powers and the authority to accept an "assurance of voluntary compliance" without filing suit were given to the Consumer Credit Commissioner and penalties were increased to ten thousand dollars for each violation of an injunction.<sup>18</sup> What seemed like a great step forward in strengthening enforcement was more than offset by the addition of three more exemptions to the already broad exclusion provided in 1967. Now immunized from prosecution was the insurance industry; advertising media, absent a showing that the intent or purpose of the advertiser was known by the advertising medium's owner or personnel; and any conduct that was subject to and compliant with the regulations and statutes administered by the FTC.<sup>19</sup> Like the 1967 legislation, the 1969 amendments failed to extend a private remedy to those victimized by deceptive practices; instead, it was expressly provided that "[n]othing in this Chapter either charges or diminishes the rights of parties in private litigation."<sup>20</sup>

Therefore, when I became attorney general in January 1973, I realized that my first major task was to improve Texas law to better protect the consumer. Needed was both strengthened public enforcement tools and the creation of an effective private remedy. With the drafting assistance of now Senator Lloyd Doggett, who was then President of the Texas Consumer Association, the hard legislative work of the bill's able sponsors, Senators Oscar Mauzy and A. R. "Babe" Schwartz in the Senate and then House member, now Senator, Carl Parker in the House, and with the support of such diverse organizations as the Texas Retail Federation, the Texas AFL-CIO, and the Texas Junior Bar, we devised and passed the Texas Deceptive Trade Practices-Consumer Protection Act of 1973<sup>21</sup> [DTPA]. It became law on May 21, 1973.

The DTPA represented a marked departure from past law. Substantively, much of the old law was kept intact. The general prohibition against "false, misleading, or deceptive acts or practices" and the reference to FTC rules and regulations were retained.<sup>22</sup> Most of the old list of specifically prohibited practices was reenacted, but nine new items were added, bringing the number of prohibitions on the new "laundry

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17. *Id.* at 1505.

18. *Id.* at 1506-08.

19. *Id.* at 1505.

20. *Id.* at 1505.

21. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Supp. 1976-1977).

22. *Id.* § 17.46(a), (c).

list" to twenty.<sup>23</sup> Importantly, three of the four exemptions were abolished, leaving only the media with a limited immunity.<sup>24</sup>

The DTPA's most significant contribution, however, was in the area of remedies. The Consumer Protection Division of the Attorney General's Office, rather than the Consumer Credit Commissioner, was given primary authority to enforce the Act and could now seek, not only an injunction, but also civil penalties from two thousand dollars per violation up to a maximum of ten thousand dollars in the original enforcement action against the defendant.<sup>25</sup> Additionally, the Consumer Protection Division was given the power to seek restitution or actual damages on behalf of identifiable persons injured by the wrongful conduct of the defendant.<sup>26</sup> Most importantly, the legislature, recognizing the inadequacies of common law remedies, provided a private cause of action for treble damages, court costs, and attorneys' fees for any consumer "adversely affected" by a deceptive trade practice, a breach of an express or implied warranty, any "unconscionable action or course of action," or by any violation of article 21.21 of the Insurance Code.<sup>27</sup>

By extending to the consumer the same cause of action for deceptive practices formerly available only to the attorney general, the DTPA substantially lightened the burden of proof required of the consumer in common law actions for fraud. The FTC interpretations of the Federal Trade Commission Act, which Texas courts were instructed by the DTPA to follow, had already abandoned the requirement of "intent to deceive" and "reliance." Representations and advertisements are unlawful regardless of the intent of the seller if they have the "capacity" or "tendency" to deceive; actual deception is not required.<sup>28</sup> Moreover, conduct has the capacity to deceive even if the reasonable or intelligent buyer would not have been misled. If the conduct could mislead the "ignorant, the unthinking and the credulous," it violates the law.<sup>29</sup> Thus, the defense of "puffing" was substantially curtailed.<sup>30</sup> Similarly,

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23. *Id.* § 17.46(b).

24. *Id.* § 17.49(a).

25. *Id.* § 17.47(a), (c).

26. *Id.* § 17.47(d).

27. *Id.* § 17.50(a), (b)(1).

28. *Goodman v. FTC* 244 F.2d 584, 604 (9th Cir. 1957); *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944); *FTC v. Hires Turner Glass Co.*, 81 F.2d 362, 364 (3d Cir. 1935); *Bourland v. State*, 528 S.W.2d 350, 355 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

29. *E.g.*, *Gulf Oil Corp. v. FTC*, 150 F.2d 106, 109 (5th Cir. 1945).

30. *See In re Better Living, Inc.*, 54 F.T.C. 648, 653 (1957), *aff'd*, 259 F.2d 271

the "materiality" of the misrepresentation, while recognized as a factor by the FTC, is of no real consequence.<sup>31</sup> Significantly, any waiver of the remedies in the DTPA was declared "void and unenforceable." While extending a new cause of action to the consumer, the DTPA did not seek to repeal the consumer's right to bring a common law fraud action. Section 17.43 provided quite clearly that the DTPA's provisions are not "exclusive" and its remedies "are in addition to any other procedures or remedies provided for in any other law."

Having overcome the first hurdle to effective private redress for consumer deception—the burden of proof, the new DTPA addressed the second hurdle—the disincentive to litigate arising from the imbalance between the high cost and practical difficulties of litigation and the small "actual" damages characteristic of most consumer claims. The obvious answer was to provide for an award of multiple damages, in addition to court costs and attorneys' fees, to the consumer who prevails in a lawsuit so that the consumer would be encouraged to seek private resolution of his grievance. A new mechanism was required to accomplish this purpose. As noted, exemplary damages would not suffice<sup>32</sup> since the plaintiff could never be sure that the trier of fact would ultimately find the requisite degree of culpability on the defendant's part<sup>33</sup> or of the amount of exemplary damages he would ultimately be awarded, as that decision is left to the jury to be decided in light of the particular facts of the case at hand.<sup>34</sup> To remove this uncertainty the legislature created the automatic trebling mechanism of section 17.50(b)(1). Now the consumer would be assured from the outset that if he proved a cause of action under section 17.50(a), he would receive three times his actual damages.

All of the features of common law fraud that had stood in the way of effective private consumer redress were now gone. The enforcement mechanisms of the DTPA truly fulfilled the legislative purposes of

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(3d Cir. 1958). See also 2 G. ROSDEN & P. ROSDEN, *THE LAW OF ADVERTISING* § 18.04 (4) (1976); 2 [1976] *TRADE REG. REP. (CCH)* ¶ 7533, 12,032.

31. See *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 77 (1934); *Moretrench Corp. v. FTC*, 127 F.2d 792, 795 (2d Cir. 1942). See also Note, *Developments in the Law—Deceptive Advertising*, 80 *HARV. L. REV.* 1005, 1056 (1967).

32. In fact, the legislature expressly rejected exemplary damages. When the DTPA was passed by the House as H.B. 417, it authorized an award of "punitive damages" in addition to the other remedies now available under § 17.50(b). *TEX. H.R.J.* 2096 (1973). The Senate deleted this provision and the House concurred. *Id.* at 5383.

33. See, e.g., *Gale v. Spriggs*, 346 S.W.2d 620, 625-26 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.).

34. *Burke v. Bean*, 363 S.W.2d 366, 368 (Tex. Civ. App.—Beaumont 1962, no writ).

“protect[ing] consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty” and “provid[ing] efficient and economical procedures to secure such protection.”<sup>35</sup> The injured consumer—armed with a certain, multiple damage remedy—could now protect himself, thus lessening the demand for public enforcement actions for restitution and damages.

Armed with these new statutory tools, the Attorney General’s Office has pursued a vigorous and effective enforcement program. Since May 21, 1973, the date the DTPA became effective, as a result of 305 legal actions (223 lawsuits and 83 assurances of voluntary compliances), the state has been awarded \$298,626 in civil penalties while injured consumers have received \$1,030,924 in restitution and other economic benefits.<sup>36</sup> Further, in processing 42,410 complaints since 1973, we have assisted Texas consumers in actually recovering an additional \$3,214,216 in restitution. Although no statistics on private litigation are available, there is reason to believe, based on the increasing number of reported cases, that there is more frequent use of the private treble damage remedy.

But protection of the consumer does not depend solely on the vigorous use of legal remedies. There must be an increased commitment to consumer education. All the laws in the world cannot adequately protect those who lack the most rudimentary skills of the marketplace. According to a 1975 University of Texas study,<sup>37</sup> twenty-one percent of all Texas adults are either incapable of conducting modern day activities, such as properly filling out a check, or are doing so with difficulty. Another thirty-one percent are only minimally competent to handle day-to-day matters of living. The sad truth is that 2,399,000 Texas adults are incompetent in basic consumer skills, such as being able to figure their change from a twenty dollar bill when looking at a cash register receipt, while 1,682,000 have difficulty figuring how much is deducted from their paychecks—even with the numbers in front of

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35. TEX. BUS. & COMM. CODE ANN. § 17.44 (Supp. 1976-1977).

36. How effective the State’s enforcement program will be in the future depends largely on the level of financial commitment the state is willing to make. While Texas’ consumer protection budget ranked sixth in the nation in 1973 when compared to their state attorneys general offices, Texas fell to twenty-second when the state’s population, income, and total retail sales, were taken into account. Bernacchi, *Consumer Protection, Is It Worth the Candle?: An Analysis of State Consumer Protection Appropriations*, 52 J. URB. L. 913, 915, 919, 921 (1975).

37. TEXAS STATE MANPOWER SERVICES COUNCIL AND TEXAS EDUCATION AGENCY, *ADULT FUNCTIONAL COMPETENCY IN TEXAS* (1975) (report prepared by The Adult Performance Level Project, The University of Texas at Austin, Division of Extension and Industrial and Business Training Bureau).



them. Unless we are willing to require basic consumer education and unless we are willing to foot the bill to make it meaningful, consumers will never be able to protect themselves adequately from unwise purchases or deceptive sales practices.

For the present, lawyers must become better acquainted with the developing concepts of consumer law. Lawyers for consumers and businessmen alike need to know what the legal requirements are and where the law will likely take us in the future— thus the importance of this issue of the *Journal*. It contains, first, a comprehensive treatment of the public and private rights and remedies under the DTPA. Next is a discussion of the preservation of consumer claims and defenses, including a discussion of the FTC's new holder-in-due course rule. This is followed by a related article dealing with the liability of assignees under the Consumer Credit Code.

On the federal level, recent developments in federal consumer credit legislation and case law are examined. Such amendments as the addition of leased goods to Truth-in-Lending coverage are presented. Additionally, advertising restrictions on licensed occupations are analyzed from an antitrust perspective.

Student commentaries deal with landlord-tenant relations, the applicability of the DTPA to professionals, the law relating to debt collection practices, and the various aspects of credit advertising.

The contributors and the editorial staff of the *Journal* are to be praised for this ambitious undertaking in an extremely important area of the law.