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## Public and Private Rights and Remedies under the Deceptive Trade Practices - Consumer Protection Act.

Philip K. Maxwell

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**PUBLIC AND PRIVATE RIGHTS AND REMEDIES  
UNDER THE DECEPTIVE TRADE PRACTICES—  
CONSUMER PROTECTION ACT**

**PHILIP K. MAXWELL\***

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**I. INTRODUCTION**

Prior to 1973, the Texas consumer was virtually defenseless to depredations in the marketplace. Debt collectors could work misery on debtors through incessant phone calls, profane language, and fraudulent misrepresentations. Landlords could interrupt a tenant's utility service,

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bar him from his premises, and wrongfully withhold his security deposit. Door-to-door salesmen could pressure people into purchasing expensive items they neither needed nor wanted and sellers, generally, could grossly exaggerate the value of their goods and services. This conduct was not necessarily lawful; much of it was not. The problem was that the remedies for such abuse were so woefully inadequate as to render virtually meaningless what rights a consumer did have. Even if an individual set of facts met the requirements for a cause of action, the time and cost of litigation when contrasted with the generally small recovery potential caused most consumers to simply "grin and bear it," leaving the wrongdoers to continue business as usual.<sup>1</sup>

Public enforcement was equally ineffective. Article 5069-10.01 through-10.08 prohibited deceptive trade practices,<sup>2</sup> but the attorney general could sue only for an injunction.<sup>3</sup> Penalties were permitted only when the defendant had violated an injunction,<sup>4</sup> effectively allowing every defendant two violations before an effective sanction was imposed.

The "reform legislature"<sup>5</sup> of 1973 sought to rectify these problems. First, it passed the Debt Collection Practices Act<sup>6</sup> which, among other things, prohibited debt collectors<sup>7</sup> from using threats or coer-

1. For a discussion of common law remedies for consumer wrongs see E. KINTNER, *A PRIMER ON THE LAW OF DECEPTIVE PRACTICES—A GUIDE FOR THE BUSINESSMAN* 5-13 (1971). The shortcomings of the common law remedy for unreasonable debt collection practices are discussed in Anderson, *Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?*, 13 HOUS. L. REV. 84 (1975).

2. TEX. REV. CIV. STAT. ANN. art. 5069-10.01 to .08 (1971) (repealed 1973) contained a general prohibition against "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce" and specifically condemned fifteen "deceptive practices." *Id.* art. 5069-10.01(b), .02 (repealed 1973).

3. *Id.* art. 5069-10.04 (repealed 1973). The attorney general could sue on his own initiative or on request of the Consumer Credit Commissioner. *Id.* art. 5069-10.04(a) (repealed 1973).

4. *Id.* art. 5069-10.08(c) (repealed 1973) (ten thousand dollars per violation).

5. The 1973 legislature was the first to convene after the Sharpstown scandal and was commonly referred to as the "reform legislature." For an insightful discussion of the events leading up to and the results of this legislative session, see C. DEATON, *THE YEAR THEY THREW THE RASCALS OUT* (1973).

6. TEX. REV. CIV. STAT. ANN. art. 5069-11.01 to .11 (Supp. 1976-1977). The statute prohibits 31 specific kinds of conduct by debt collectors. There is reason to believe, however, that the courts will look to the common law harassment suits in determining what conduct violates the statute and that any collection efforts after the debt is paid are unreasonable per se. See *Pullins v. Credit Exch., Inc.*, 538 S.W.2d 681, 683 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

7. A "debt collector" is "any person engaging directly or indirectly in debt collection . . . and includes any person who sells, or offers to sell, forms represented to be

cion;<sup>8</sup> harassment or abuse;<sup>9</sup> unfair or unconscionable means;<sup>10</sup> or fraudulent, deceptive, or misleading representations.<sup>11</sup> Any person—broadly defined to include any debtor, governmental agency, competitor, or virtually anyone else whether affected by the wrongful conduct or not<sup>12</sup>—was given the power to seek an injunction, damages, attorneys' fees, and court costs<sup>13</sup> in an action to enforce the statute.

The second legislative effort dealt with tenant rights. Landlords were prohibited from interrupting or causing interruption of utility service paid for by the tenant directly to the utility company<sup>14</sup> and from intentionally prohibiting a tenant from entering his premises.<sup>15</sup> Aggrieved tenants were given the right to sue, not only to recover posses-

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a collection system, device, or scheme, intended or calculated to be used to collect debts." TEX. REV. CIV. STAT. ANN. art. 5069-11.01(c) (Supp. 1976-1977). "Debt" is "any obligation or alleged obligation arising out of a consumer transaction." *Id.* art. 5069-11.01 (a). "Consumer transaction," in turn, is any transaction in which at least one of the parties is an individual who owes or allegedly owes a debt created primarily for personal, family, or household purposes. *Id.* art. 5069-11.01(d), (e). In *Ledisco Financial Servs., Inc. v. Viracola*, 533 S.W.2d 951, 955 (Tex. Civ. App.—Texarkana 1976, no writ), the statute was held to apply to unreasonable efforts to secure the return of a credit card that the plaintiff had used for personal purposes and which he had a contractual obligation to return upon cancellation. The fact that the defendant made no effort to collect the underlying money debt was immaterial. *See id.* at 955.

8. TEX. REV. CIV. STAT. ANN. art. 5069-11.02 (Supp. 1976-1977).

9. *Id.* art. 5069-11.03.

10. *Id.* art. 5069-11.04. Such conduct would also be "unconscionable" under the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COMM. CODE ANN. § 17.50(a)(3) (Supp. 1976-1977).

11. TEX. REV. CIV. STAT. ANN. art. 5069-11.05 (Supp. 1976-1977). Since the 16 kinds of conduct specified in this section are declared to be "fraudulent, deceptive, or misleading," then presumably establishing such conduct would also establish per se violation of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COMM. CODE ANN. §§ 17.46(a), .46(b)(12) (Supp. 1976-1977).

12. "Person" is any "individual, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity." TEX. REV. CIV. STAT. ANN. art. 5069-11.01(g) (Supp. 1976-1977).

13. *Id.* art. 5069-11.10. Suits brought in bad faith or to harass the defendant, however, may result in a judgment awarding the defendant attorneys' fees and court costs.

It has been held that damages for "mental anguish" may be awarded under the statute without a showing of physical illness or injury. *Ledisco Financial Servs., Inc. v. Viracola*, 533 S.W.2d 951, 957 (Tex. Civ. App.—Texarkana 1976, no writ). Although the statute does not so provide, *Viracola* held that exemplary damages were recoverable. *Id.* at 957.

Contributory negligence is no defense in an action alleging unreasonable collection efforts. *Pullins v. Credit Exch., Inc.*, 538 S.W.2d 681, 683 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.). The only defense—bona fide error under art. 5069-11.08—requires proof that the violation upon which plaintiff is seeking to recover factually resulted from a bona fide or innocent, unintentional mistake that occurred despite the previous implementation of reasonable procedures designed to avoid that very mistake. *See Central Adjustment Bureau, Inc. v. Gonzales*, 528 S.W.2d 314, 316 (Tex. Civ. App.—San Antonio 1975, no writ).

14. TEX. REV. CIV. STAT. ANN. art. 5236c, § 1 (Supp. 1976-1977).

15. *Id.* art. 5236c, § 2.



sion or terminate the rental agreement, but for damages, one month's rent, and attorneys' fees.<sup>16</sup> Landlords were also required to return security deposits within thirty days after the tenant surrendered the premises, and no part of the deposit could be retained for "normal wear and tear."<sup>17</sup> Bad faith retention of the security deposit authorized the tenant to sue for one hundred dollars plus three times the amount of the deposit wrongfully withheld.<sup>18</sup>

Third, the legislature sought to deal with consumer transactions in the context of home solicitations.<sup>19</sup> Consumers<sup>20</sup> were given the right to cancel a home solicitation transaction<sup>21</sup> without obligation within three business days after signing the resulting agreement.<sup>22</sup> Merchants<sup>23</sup> were required to give oral and written notice to the consumer of his right to cancel and to provide him with a cancellation form, both of which had to be in the same language as that principally used in the sales pitch.<sup>24</sup> Failure to comply with the Act was made a "deceptive trade practice,"<sup>25</sup> and consumers were given a statutory cause of action for actual damages, attorneys' fees, and court costs.<sup>26</sup>

By far the most far-reaching and significant piece of consumer legislation passed in 1973 was the Deceptive Trade Practices-Consumer Protection Act<sup>27</sup> [DTPA]. Substantively, the legislature kept much of

16. *Id.* art. 5236c, § 4. Any purported waiver of rights or liabilities under the statute was made void and unenforceable. *Id.* art. 5236c, § 5.

17. *Id.* art. 5236e, §§ 2(a), 3(a).

18. *Id.* art. 5236e, § 4(a) (attorneys' fees also recoverable where bad faith retention of security deposit shown).

19. TEX. REV. CIV. STAT. ANN. art. 5069-13.01 to .06 (Supp. 1976-1977).

20. A "consumer" is "an individual who seeks or acquires, real or personal property, services, money, or credit for personal, family, or household purposes." *Id.* art. 5069-13.01(2).

21. Generally, a "home solicitation transaction" is one in which the merchant engages in a personal solicitation of the consumer and the consumer offers or agrees to purchase at the consumer's home. Sales of goods under \$25 and all farm equipment sales are excluded. *Id.* art. 5069-13.01(5)(A). Sales of realty in excess of \$100 are covered except where: (1) the consumer is represented by an attorney; (2) the agreement is negotiated by a licensed real estate broker; or (3) the agreement is negotiated by the person who owns the realty not at the residence of the consumer. *Id.* art. 5069-13.01(5)(B).

22. *Id.* art. 5069-13.02(a).

23. A "merchant" is any party to a home solicitation transaction other than the consumer. *Id.* art. 5069-13.01(4).

24. *Id.* art. 5069-13.02(c). This provision is satisfied if the defendant complies with the FTC trade regulation rule on door-to-door sales. *Id.* art. 5069-13.02(d); see 16 C.F.R. § 429 (1976).

25. TEX. REV. CIV. STAT. ANN. art. 5069-13.03 (Supp. 1976-1977). A violation of this statute is a per se violation of the TEX. BUS. & COMM. CODE ANN. §§ 17.46(a), .46(b)(12) (Supp. 1976-1977); see discussion note 11 *supra*.

26. TEX. REV. CIV. STAT. ANN. art. 5069-13.03(7)(c) (Supp. 1976-1977).

27. TEX. BUS. & COMM. CODE ANN. §§ 17.41 to .63 (Supp. 1976-1977) (hereinafter referred to as the "DTPA" or "Consumer Protection Act").

the old law intact. The prior act's general prohibition against "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce," and its incorporation of Federal Trade Commission rules and regulations were retained.<sup>28</sup> Most of the former provisions prohibiting designated practices were reenacted, but nine new items were added bringing the number of prohibitions on the new "laundry list" to twenty.<sup>29</sup> Thus, as under prior law, Texas courts could still hold a defendant's conduct to violate the DTPA if that conduct was outlawed by any of the items on the laundry list; condemned by any of the FTC's rules, regulations, or interpretations of the Federal Trade Commission Act; or if it was "false, misleading, or deceptive" in that it had the capacity or tendency to deceive.<sup>30</sup>

The DTPA's most significant contribution was in the area of remedies. The Attorney General's Consumer Protection Division was given the power to seek, not only an injunction<sup>31</sup> but also civil penalties of two thousand dollars per violation, up to a maximum of ten thousand dollars, in the original enforcement action against the defendant.<sup>32</sup> Additionally, the attorney general was given specific authority to seek restitution or damages on behalf of persons injured by the wrongful conduct of the defendant.<sup>33</sup> Perhaps most importantly, private consumers were authorized to sue for treble damages, court costs, and attorneys' fees when adversely affected<sup>34</sup> by a deceptive trade practice,<sup>35</sup> by a breach of an express or implied warranty,<sup>36</sup> by any "unconscionable action or course of action,"<sup>37</sup> or by any violation of article 21.21 of the Insurance Code,<sup>38</sup> which itself prohibits certain deceptive and unfair practices.<sup>39</sup>

This article will discuss the Consumer Protection Act from the perspective of the Consumer Protection Division of the Attorney General's

28. Compare TEX. BUS. & COMM. CODE ANN. § 17.46(a), (c) (Supp. 1976-1977), with TEX. REV. CIV. STAT. ANN. art. 5069-10.02(a), (b) (1971) (repealed 1973).

29. Compare TEX. BUS. & COMM. CODE ANN. § 17.46(b) (Supp. 1976-1977), with TEX. REV. CIV. STAT. ANN. art. 5069-10.01(b) (1971) (repealed 1973).

30. See text accompanying notes 41-179 *infra* for a discussion of the law of deceptive trade practices.

31. District and county attorneys may seek injunctive relief under the DTPA. TEX. BUS. & COMM. CODE ANN. § 17.48 (Supp. 1976-1977).

32. *Id.* § 17.47(a), (c).

33. *Id.* § 17.47(d).

34. *Id.* § 17.50(a).

35. See *id.* § 17.50(a)(1) (referring to § 17.46); text accompanying notes 41-49 *infra*.

36. *Id.* § 17.50(a)(2). See text accompanying notes 279-309 *infra*.

37. *Id.* § 17.50(a)(3). See text accompanying notes 310-22 *infra*.

38. *Id.* § 17.50(a)(4). See text accompanying notes 323-64 *infra*.

39. TEX. INS. CODE ANN. art. 21.21 (1963).

Office, which is given specific statutory authority to enforce the DTPA.<sup>40</sup> Part II analyzes the law of deceptive trade practices. Part III describes the functions, powers, and policies of the Attorney General's Consumer Protection Division in enforcing the DTPA. Part IV discusses the four private causes of action provided the injured consumer under the DTPA and the various remedies available to him, with particular emphasis on the question of whether trebling of damages is mandatory or permissive.

## II. THE LAW OF DECEPTIVE TRADE PRACTICES

### A. The General Prohibition of Section 17.46(a)

1. *General considerations.* To determine whether a certain act or practice is "false, misleading, or deceptive" and therefore unlawful, Texas courts are directed by the DTPA to the "interpretations given by the Federal Trade Commission and federal courts to section 5(a)(1) of the Federal Trade Commission Act."<sup>41</sup> The importance of FTC rules and regulations is underscored in the "exemption" section which states that the provisions of the DTPA "do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice."<sup>42</sup> The final result is that if Federal Trade Commission interpretations or regulations condemn a particular act or course of conduct, it is prohibited under Texas law, and even when not condemned, may still be unlawful if under a given set of facts it is "false, misleading, or deceptive."

An act or practice is "false, misleading, or deceptive" if it has the capacity or tendency to deceive;<sup>43</sup> actual deception is not required.<sup>44</sup> In determining capacity or tendency to deceive, consideration is given the impact of the representation on the "ignorant, the unthinking and the credulous."<sup>45</sup> The materiality of the misrepresentation, while recog-

40. TEX. BUS. & COMM. CODE ANN. §§ 17.45(8), .47(a). The Consumer Protection Division is the only statutorily recognized division of the Attorney General's Office.

41. *Id.* § 17.46(c).

42. *Id.* § 17.49(b).

43. *Goodman v. FTC*, 244 F.2d 584, 602 (9th Cir. 1957); *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944); *Bourland v. State*, 528 S.W.2d 350, 355 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Wesware, Inc. v. State*, 488 S.W.2d 844, 848 (Tex. Civ. App.—Austin 1972, no writ).

44. *FTC v. Hires Turner Glass Co.*, 81 F.2d 362, 364 (3d Cir. 1935).

45. *See, e.g., Gulf Oil Corp. v. FTC*, 150 F.2d 106, 109 (5th Cir. 1945); *Charles*

nized as a factor,<sup>46</sup> is of no real consequence. The consumer is entitled to the truth, even if it would only be of value in making an irrational buying decision.<sup>47</sup> Intent to deceive, historically an element of common law fraud,<sup>48</sup> is totally irrelevant in determining liability under the DTPA.<sup>49</sup>

2. *Special problems.* Two problems, deception by innuendo and the duty to speak, should be examined in relationship to the DTPA.

a. *Deception by innuendo.* It is clear that any express falsehood will violate the DTPA.<sup>50</sup> In many situations, however, the decep-

of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944).

Like all rules, this one deserves some qualification. In *In re Heinz*, Commissioner Elman, speaking for the Commission, said:

True, as has been reiterated many times, the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable . . . . This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it, therefore, an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.

*In re Heinz*, 63 F.T.C. 1282, 1290 (1963), *aff'd sub nom.*, *Kirchner v. FTC*, 337 F.2d 751 (9th Cir. 1964). See also *In re Papercraft Corp.*, 63 F.T.C. 1965, 1993 (1963). For a critical discussion of the evolution of the "standard of perception" employed by the Commission, see 2 G. ROSDEN & P. ROSDEN, *THE LAW OF ADVERTISING* § 18.02 (1976).

46. *Moretrench Corp. v. FTC*, 127 F.2d 792, 795 (2d Cir. 1942); Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1056 (1967); see *Pep Boys—Manny, Moe, & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941).

47. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934). It should also be noted that the DTPA makes no reference to materiality.

48. *E.g.*, *Wilson v. Jones*, 45 S.W.2d 572, 573 (Tex. Comm'n App. 1932, holding approved); *Bondies v. Glenn*, 119 S.W.2d 1095, 1098 (Tex. Civ. App.—Eastland 1938, writ dismissed); *Panhandle & Santa Fe Ry. v. O'Neal*, 119 S.W.2d 1077, 1079-80 (Tex. Civ. App.—Eastland 1938, writ refused). In Texas, intent to deceive or knowledge that a representation is false, while not an essential element of fraud, must be shown to recover exemplary damages. *Success Motivation Inst., Inc. v. Lawlis*, 503 S.W.2d 864, 868 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ refused n.r.e.).

49. See *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967) ("[w]hatever Ward's intentions were in advertising, they are not controlling"); *Gimbel Bros. v. FTC*, 116 F.2d 578, 579 (2d Cir. 1941) ("a deliberate effort to deceive is not necessary"). See also *State v. Credit Bureau, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975) (state need not show "knowing" violation of injunction to collect civil penalties).

The word "intent" does appear, however, in two items in the laundry list. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(9), (10) (Supp. 1976-1977). The word "knowingly" appears in § 17.46(b)(13) and "fraudulently" in § 17.46(b)(17).

50. See, *e.g.*, *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934) (composition of

tion can be more subtle, as where one statement in a sales pitch or advertisement is untrue or deceptive, while other statements therein attempt to "clarify" the untrue or deceptive one. The rule is that a violation occurs if the sales pitch or advertisement *taken as a whole* has the capacity or tendency to deceive.<sup>51</sup> If the statement that purports to qualify or "defalsify" the deceptive statement is not, in the case of an advertisement, as conspicuous as, or located in, the immediate vicinity of the deceptive statement or, in the case of a sales pitch, is not so fully emphasized as the deceptive statement, then a violation will likely be found.<sup>52</sup>

The same general rule would make unlawful an advertisement or sales pitch which, as a whole, is misleading though each sentence, separately considered, is literally true. As stated by the United States Supreme Court, such deception can occur "because things are omitted that should be said, or because advertisements are composed or purposefully printed in such a way as to mislead."<sup>53</sup>

b. *The duty to speak.* Silence is not golden under the DTPA since "[t]o tell less than the whole truth is a well-known method of deception."<sup>54</sup> Clearly, there is a duty to disclose facts which would cure a misapprehension that could result from statements made.<sup>55</sup> It has also been held that a duty exists to disclose a product's composition if it has been changed<sup>56</sup> or is different than what it appears,<sup>57</sup> to disclose a danger that might result from use of the product,<sup>58</sup> and to disclose the prior use of a product.<sup>59</sup>

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product misstated); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933) (seller not "manufacturer"); *Masland Duraleather Co. v. FTC*, 34 F.2d 733 (3d Cir. 1929) (goods not "leather"); *In re Perfect Mfg. Co.*, 43 F.T.C. 238 (1946) (goods not "fireproof").

51. See, e.g., *Spiegel, Inc. v. FTC*, 411 F.2d 481 (7th Cir. 1969); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *Elliot Knitwear, Inc. v. FTC*, 266 F.2d 787 (2d Cir. 1959); Barnes, *The Law of Trade Practices—II, False Advertising*, 23 OHIO ST. L.J. 597, 640 (1962).

52. *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963) (qualifying statement too remote from and less conspicuous than deceptive one), *cert. dismissed*, 376 U.S. 967 (1964); *Metal Stamping Corp. v. General Motors Corp.*, 33 F.2d 411, 412 (7th Cir. 1929).

53. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188 (1948).

54. *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950). See also *Benrus Watch Co. v. FTC*, 352 F.2d 313 (8th Cir. 1965).

55. See *Alberty v. FTC*, 182 F.2d 36, 43 (D.C. Cir. 1950) (dissenting opinion), *cert. denied*, 340 U.S. 818 (1950). In short, there is a duty to cure half-truths or false impressions.

56. *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922).

57. *Benrus Watch Co. v. FTC*, 352 F.2d 313, 323 (8th Cir. 1965); *Theodore Kagen Corp. v. FTC*, 283 F.2d 371 (D.C. Cir. 1960).

58. *American Medicinal Prods., Inc. v. FTC*, 136 F.2d 426, 427 (9th Cir. 1943).

59. *Double Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268, 270 (10th Cir. 1965).

Generally speaking, an advertisement should set forth whatever the purchaser would normally want to know about the nature and use of the product. If certain information could affect the tendency to buy or not to buy, then it is a safe bet that such information should be disclosed in advertising.<sup>60</sup>

#### B. Section 17.46(b): The "Laundry List" of Per Se Violations

There are twenty specifically prohibited practices in the DTPA, commonly referred to collectively as the "laundry list." These twenty practices are made "per se" violations; there is no requirement for an issue or a finding that the practice has the tendency or capacity to deceive.<sup>61</sup> The following discussion briefly examines each of the provisions in the "laundry list."<sup>62</sup> This discussion, however, should not be taken as a limitation on the application of any given item.

1. *Passing off goods or services as those of another.*<sup>63</sup> The "passing off" doctrine generally applies where a brand of goods or services is substituted for those requested by the consumer.<sup>64</sup>

2 and 3. *Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services*<sup>65</sup> and *causing confusion or misunderstanding as to affiliation, connection, or associa-*

60. E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 105 (1971); see Morse, *A Consumer's View of the FTC Regulation of Advertising*, 17 KAN. L. REV. 639, 640 (1969) (duty to disclose all information required to make "informed choice").

61. However, the roles of the judge and jury in a deceptive trade practice suit have yet to be clearly defined. As indicated, TEX. BUS. & COMM. CODE ANN. § 17.46(a) (Supp. 1976-1977) declares "[f]alse, misleading or deceptive acts or practices" unlawful. Section 17.46(b) then defines "false, misleading, or deceptive acts or practices" to include the 20 specific items on the laundry list. Consequently, there seems little reason for the jury to be asked whether laundry list conduct is "false, misleading, or deceptive."

When the conduct is alleged to violate §17.46(a) alone, however, the issue is less clear. One choice is to submit to the jury only whether the conduct occurred, leaving to the court whether the conduct, if so found, is, under applicable FTC rulings and case law, "false, misleading, or deceptive." A second alternative is to submit both the conduct and the "false, misleading, or deceptive" inquiry to the jury with an appropriate instruction. See Jacks, *Random Thoughts on Deceptive Trade Practice Litigation*, 11 TEX. TRIAL LAW. F. 34, 37 (1977) (sample instruction suggests inclusion of applicable laundry list items with general statement of law of deceptive trade practices, e.g. "capacity to deceive," etc.). The final alternative is to leave the determination of § 17.46(a) to the court. This apparently is the approach in North Carolina. See *Hardy v. Toler*, 218 S.E.2d 342 (N.C. 1975), noted in 54 N.C.L. REV. 963 (1976).

62. For a similar discussion of each of the acts or practices prohibited under § 17.46 (b) see Comment, *Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 426-435 (1973).

63. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(1) (Supp. 1976-1977).

64. *Mohawk Ref. Corp. v. FTC*, 263 F.2d 818, 821 (3d Cir. 1959); *Coca-Cola Co. v. Foods, Inc.*, 220 F. Supp. 101, 103-04 (D.S.D. 1963); *Bishop's Pharmacy, Inc. v. Pecan Krisp Co.*, 53 S.W.2d 637, 638-39 (Tex. Civ. App.—Dallas 1932, no writ).

65. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(2) (Supp. 1976-1977).

tion with, or certification by another.<sup>66</sup> While the former section covers representations regarding the goods or services, the latter refers to representations relating to the seller or lessor of the goods or services. The "confusion doctrine" has been employed to condemn the practice of misrepresenting that a product has received the "Good Housekeeping" seal of approval,<sup>67</sup> misrepresenting that cooking utensils were endorsed or approved by dieticians,<sup>68</sup> and misrepresenting that a product has been tested or approved by the "Government."<sup>69</sup> Misrepresenting that a seller is affiliated or connected with a charitable or nonprofit organization has been held unlawful,<sup>70</sup> as has the common door-to-door practice of saying that one is taking a poll, survey, or sample simply to gain entrance into the consumer's household.<sup>71</sup>

4. *Using deceptive representations or designations of geographic origin in connection with goods or services.*<sup>72</sup> This section prevents the exploitation of a consumer's preference for goods that are actually from a certain geographic area. Thus, the FTC has prohibited, among other representations, the use of the words "Mineral Wells, Texas," "Made from Texas Mineral Water," or "Mineral Wells" to describe mineral crystals not so derived.<sup>73</sup> Also prohibited is the use of "Made in U.S.A." in referring to foreign-made products.<sup>74</sup>

5. *Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not.*<sup>75</sup> This is one of the most frequently used laundry list items since it prohibits virtually every conceivable kind of false representation.

6. *Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand.*<sup>76</sup> It is unlawful to

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66. *Id.* § 17.46(b)(3).

67. *Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 341-42 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960).

68. *Steelco Stainless Steel, Inc. v. FTC*, 187 F.2d 693, 695 (7th Cir. 1951).

69. *Goodman v. FTC*, 244 F.2d 584, 589 (9th Cir. 1957).

70. *National Trade Publications Serv., Inc. v. FTC*, 300 F.2d 790, 791 (8th Cir. 1962).

71. *Standard Distribs., Inc. v. FTC*, 211 F.2d 7, 10 (2d Cir. 1954).

72. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(4) (Supp. 1976-1977).

73. *In re Mineral Wells Crystal Producers, Inc.*, 34 F.T.C. 133, 134-35 (1941).

74. *In re Windsor Pen Corp.*, 64 F.T.C. 454, 460 (1964) ("made in the U.S.A." improper because product contained "substantial item or part" of imported goods).

75. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(5) (Supp. 1976-1977).

76. *Id.* § 17.46(b)(6).

represent as new, products which are used, secondhand, reprocessed, rebuilt, or made from used materials.<sup>77</sup>

7. *Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.*<sup>78</sup> Misrepresenting, for example, that a product is "easy to use,"<sup>79</sup> "leakproof,"<sup>80</sup> "mildewproof,"<sup>81</sup> "patented,"<sup>82</sup> or "authentic"<sup>83</sup> is unlawful.

8. *Disparaging goods or services or business of another by false or misleading representations of facts.*<sup>84</sup> This section disallows any comparisons of products or services that contain any untrue or misleading statements.<sup>85</sup> Disparagement frequently occurs in the context of "bait and switch" schemes where the generally lower priced advertised product is disparaged in an effort to switch the consumer to a higher priced product.<sup>86</sup>

9 and 10. *Bait advertising prohibitions: Advertising goods or services with intent not to sell them as advertised*<sup>87</sup> *and advertising goods or services with intent not to supply a reasonable, expectable public demand.*<sup>88</sup> Neither of these prohibitions requires that an effort be made to "switch" the consumer to a product other than the one advertised. These provisions are not violated, however, by the mere fact that the

77. See, e.g., *In re General Transmissions Corp.*, 73 F.T.C. 399 (1968); *In re Metropolitan Golf Ball, Inc.*, 66 F.T.C. 378 (1964); *State v. Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo. Ct. App. 1973).

The FTC has established six months as the maximum period in which a product may be called "new." FTC Advisory Opinion No. 120 (1967). Such a representation beyond the six month period might still not violate § 17.46(b)(6) unless the product had "deteriorated." See FTC Advisory Opinion No. 146 (1967). However, such a representation might well violate the general prohibition of § 17.46(a).

78. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(7) (Supp. 1976-1977).

79. *Goodman v. FTC*, 244 F.2d 584, 589 (9th Cir. 1957) (easily learned); *Prima Prods., Inc. v. FTC*, 209 F.2d 405, 409 (2d Cir. 1954) (easy to apply).

80. *In re Wahl Co.*, 29 F.T.C. 1228, 1236 (1939).

81. *Western Auto Supply Co.*, 38 F.T.C. 764 (1944) (stip.); *M. Binkowitz & Sons, Inc.*, 37 F.T.C. 689 (1943) (stip.).

82. *In re R.T. Vanderbilt Co.*, 34 F.T.C. 378, 392 (1941); *In re Conrad Schickering*, 30 F.T.C. 1105, 1109 (1940). The same rule applies to a false claim of "patent pending." *In re Edward Shill*, 32 F.T.C. 475, 482 (1941).

83. *In re Strauss*, 63 F.T.C. 1912, 1941 (1963).

84. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(8) (Supp. 1976-1977).

85. *Steelco Stainless Steel, Inc. v. FTC*, 187 F.2d 693, 696 (7th Cir. 1951); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 516 (6th Cir. 1944); *Perma-Maid Co., Inc. v. FTC*, 121 F.2d 282, 284 (6th Cir. 1941); *Chamber of Commerce v. FTC*, 13 F.2d 673, 686 (8th Cir. 1926).

86. See, e.g., *Electrolux Corp. v. Val-Worth, Inc.*, 161 N.E.2d 197 (N.Y. 1959).

87. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(9) (Supp. 1976-1977).

88. *Id.* § 17.46(b)(10).



advertised product is unavailable when the consumer reaches the store. One must show intent not to sell or intent not to supply. Proof that the defendant did not have the product in stock at the time of the advertisement or that he had not ordered it sufficiently in advance to reasonably assure its availability; that he did not seek to cancel his advertisement once he knew, or should have known, that the product would be unavailable; or that the advertisement did not state the number of products available, should satisfy the intent requirement.<sup>89</sup>

11. *Making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions.*<sup>90</sup> The cost of goods or services has been<sup>91</sup> and will probably continue to be the most compelling factor in drawing customers. The forms of deceptive pricing may vary, but the object is always the same: to convince the buyer that he is realizing a savings when in fact he is not. Some common examples<sup>92</sup> follow:

a. *"Repossessed" or "Distressed" Merchandise.* Representing that goods for sale are the inventory of a bankrupt, or are otherwise distressed, is unlawful if untrue<sup>93</sup> since such representations convey the false impression that the seller has secured the goods at substantial savings which will likely be passed on in part to the consumer. For much the same reason it is unlawful to misrepresent that a sale is being held because the seller is bankrupt, is liquidating his inventory, is losing his lease, or is going out of business.<sup>94</sup>

b. *Comparative Pricing.* A common form of price advertising is to compare the price at which the seller is actually offering the product with his "former" or "regular" price, the price at which the

89. Proof of intent may be made through circumstantial evidence. *Wilson Fin. Co. v. State*, 342 S.W.2d 117, 123 (Tex. Civ. App.—Austin 1960, no writ). The FTC has issued Guides Against Bait Advertising, 16 C.F.R. 238 (1976), which should be used as an aid in determining violations under the Consumer Protection Act.

90. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(11) (Supp. 1976-1977).

91. See *Brown Fence & Wire Co. v. FTC*, 64 F.2d 934, 936 (6th Cir. 1933).

92. Of course, any price representations having the "capacity" or "tendency" to deceive will violate § 17.46(a) even if the precise language of § 17.46(b)(11) is not triggered.

93. *In re World Sewing Center, Inc.*, 73 F.T.C. 1007, 1017-18, modified, 74 F.T.C. 603 (1968); *In re Sewing Machine Co. of America*, 71 F.T.C. 491, 493 (1967); *In re Olson*, 71 F.T.C. 356, 357 (1967); *In re Tiller-Faith Piano Co.*, 49 F.T.C. 287, 294-95 (1952); *In re Wardell*, 30 F.T.C. 656, 661-62 (1940).

94. Though a misrepresentation that one is going out of business is specifically prohibited by § 17.46(b)(17), such a falsehood would also be unlawful under § 17.46(b)(11) as a misstatement of the "reasons for" and perhaps even the "existence of" a price reduction. See [1975] 2 TRADE REG. REP. (CCH) ¶ 7837.12 for a collection of FTC actions on this subject.

product is being offered elsewhere in the trade area, or the manufacturer's or distributor's "suggested retail price."

To lawfully compare a price to a higher, "regular" price one must have recently sold the product at the higher price in the trade area for a substantial period of time.<sup>95</sup> Similarly, one may not compare his price to the alleged retail price elsewhere or to the "suggested retail price" if none, or only a few, of the retail outlets in the area regularly sell the product at that price or if only a few isolated sales in the area have been made at that price.<sup>96</sup>

Discount, sale, special, or similar words which impliedly compare the selling price to a regular or prevailing price or which suggest that real savings are being offered, are unlawful if there is no regular or prevailing price or if the reduced price is only nominally lower than the regular or prevailing price.<sup>97</sup>

c. *"Wholesale" or "Factory" Prices.* Misrepresentation of a price as wholesale can be express<sup>98</sup> or implied, such as where the seller either expressly or impliedly represents himself to be a wholesaler<sup>99</sup> or represents that he is selling at wholesale prices—both practices are unlawful. Any representation that a price is "factory" is unlawful unless the price is the one charged by the manufacturer.<sup>100</sup>

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95. The advertising of a "regular" or "usual" price for carpeting was unlawful where the seller had not sold the carpeting before and hence had not established a "regular" or "usual" price for the carpeting. That the quoted prices were the usual prices at which other retailers in the market area were selling the carpet was no defense. *Bankers Sec. Corp. v. FTC*, 297 F.2d 403, 404-05 (3d Cir. 1961). Under the FTC Guides Against Deceptive Pricing, 16 C.F.R. § 233.1(b) (1976), the lack of sales at the former price is not necessarily fatal, but the product must have been "openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith [and not] for the purpose of establishing a fictitious price on which a deceptive comparison might be based." See also *Basic Books, Inc. v. FTC*, 276 F.2d 718 (7th Cir. 1960); *Kalwajty v. FTC*, 237 F.2d 654 (7th Cir. 1956), cert. denied, 352 U.S. 1025 (1957); *Standard Distribs., Inc. v. FTC*, 211 F.2d 7 (2d Cir. 1954); *Wolf v. FTC*, 135 F.2d 564 (7th Cir. 1943); *Thomas v. FTC*, 116 F.2d 347 (10th Cir. 1940).

96. Guides Against Deceptive Pricing, 16 C.F.R. §§ 233.2, .3 (1976).

97. *In re Standard Educators, Inc.*, 79 F.T.C. 858, 860 (1971); *In re Imperial Carpets Co.*, 75 F.T.C. 156, 157 (1969); *In re Raylew Enterprises, Inc.*, 74 F.T.C. 1093, 1103-04 (1968); Guides Against Deceptive Pricing, 16 C.F.R. § 233.1(e) (1976); see *Sears, Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919).

98. *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 106 (7th Cir. 1946); *Macher v. FTC*, 126 F.2d 420 (2d Cir. 1942).

99. *In re Federated Nationwide Wholesalers Serv.*, 71 F.T.C. 1083, 1155 (1967), modified, 398 F.2d 253 (2d Cir.), conformed, 74 F.T.C. 1430 (1968). See also Guides Against Deceptive Pricing, 16 C.F.R. § 233.5 (1976).

100. *In re Carl Mfg. Co.*, 71 F.T.C. 1156, 1176 (1967); *In re John Surrey, Ltd.*, 67 F.T.C. 299, 209-10 (1965); *In re Garland Co.*, 61 F.T.C. 552, 560 (1962). See also, Guides Against Deceptive Pricing, 16 C.F.R. § 233.5 (1976).

12. *Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.*<sup>101</sup> Representing that an agreement confers or involves rights that it does not in fact confer or involve is illustrated in *Bourland v. State*,<sup>102</sup> a major enforcement action. In that case the defendant falsely represented to prospective purchasers of country club memberships that, among other things, they would have a right to a job at the resort development at a salary of at least twenty thousand dollars per year.

Representations that an agreement confers a right prohibited by law is illustrated in *Wesware, Inc. v. State*,<sup>103</sup> where the court held that a marketing scheme that effectively involved the defendant's customers in an unlawful lottery constituted a deceptive trade practice. This prohibition is also violated where the consumer is guaranteed no competition or an exclusive selling territory in violation of the antitrust laws.<sup>104</sup> Also unlawful would be any representation that a consumer had waived any remedy conferred by the DTPA since such waivers are unenforceable and void.<sup>105</sup>

13. *Knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair services.*<sup>106</sup> This prohibition is designed to protect against unscrupulous repairmen who take advantage of the consuming public's general ignorance of how to diagnose and repair the things it buys. Innocent errors as to the need for repairs do not violate the DTPA since a "knowing" misrepresentation is required. "Knowingly" is specifically defined as an "actual awareness of the falsity or deception," but "actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness."<sup>107</sup>

14. *Misrepresenting the authority of a salesman, representative, or agent to negotiate the final terms of a consumer transaction.*<sup>108</sup> In *Crawford Chevrolet, Inc. v. McLarty*,<sup>109</sup> decided by the Amarillo Court

101. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(12) (Supp. 1976-1977).

102. 528 S.W.2d 350, 358 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

103. 488 S.W.2d 844, 848 (Tex. Civ. App.—Austin 1972, no writ). Suit was brought under TEX. REV. CIV. STAT. ANN. art. 5069-10.01 (1971) (repealed 1973).

104. *Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 241, 345 S.W.2d 702, 705 (1961) (exclusive territory agreement void); *Jackson Brewing Co. v. Clarke*, 375 S.W.2d 352, 354 (Tex. Civ. App.—Beaumont 1964, writ ref'd n.r.e.).

105. TEX. BUS. & COMM. CODE ANN. § 17.42 (Supp. 1976-1977).

106. *Id.* § 17.46(b)(13).

107. *Id.* § 17.45(9).

108. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(14) (Supp. 1976-1977).

109. 519 S.W.2d 656, 658 (Tex. Civ. App.—Amarillo 1975, no writ).

of Civil Appeals, plaintiff negotiated an agreement with the defendant's salesman to purchase a truck for four thousand dollars. Before the date of delivery, however, the manager of the dealership disapproved the initial transaction and refused to sell the vehicle unless the plaintiff agreed to pay an additional two hundred and fifty dollars. The plaintiff paid the additional amount and filed suit under the DTPA alleging successfully that the defendant had misrepresented the authority of its salesman to negotiate the final terms of the contract of purchase.

15. *Basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge of the warranty or guaranty, if any.*<sup>110</sup> Simply stated, this section prohibits a mechanic, for example, from burying in the overall repair bill the costs for any warranty or guaranty on his parts or service. If he wishes to charge an additional amount for the "insurance" given the consumer by the warranty, then that amount must be separately stated.

16. *Disconnecting, turning back, or resetting the odometer on any motor vehicle so as to reduce the number of miles indicated on the odometer gauge.*<sup>111</sup> When purchasing a used car consumers rely heavily on the odometer reading as an index of the condition and value of the vehicle.<sup>112</sup> By prohibiting rollbacks, this section seeks to assure consumers that they can rely freely on the odometer reading on any used car. Consumers are further protected by federal law which requires disclosure by the commercial seller, in affidavit form, of the number of miles on the vehicle.<sup>113</sup> These odometer statements can be used as evidence to demonstrate that an odometer was disconnected or turned back while in the possession or control of defendant.

17. *Advertising of any sale by fraudulently representing that a person is going out of business.*<sup>114</sup> As indicated earlier,<sup>115</sup> false representations that a seller is going out of business give the consumer the erroneous impression that he will be able to find bargains as a result of the seller's distressed condition.

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110. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(15) (Supp. 1976-1977).

111. *Id.* § 17.46(b)(16).

112. So stated Congress in passing the federal odometer law, 15 U.S.C. §§ 1981-1991 (1974).

113. *Id.* § 1988, and rules promulgated thereunder in 49 C.F.R. §§ 580.1-.6 (1976).

114. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(17) (Supp. 1976-1977).

115. See text accompanying notes 93 & 94 *supra*.

Since this provision employs the term "fraudulently," it could be argued that the defendant must be shown to have advertised the going out of business sale with an intent to deceive. This seems at odds with the diminishing importance placed on intent in common law fraud<sup>116</sup> and with the DTPA's policy of liberal construction.<sup>117</sup> Fraudulent intent could certainly be inferred, however, from proof that the defendant had not complied with the "Going Out of Business Sales" statute,<sup>118</sup> which requires that a person desiring to conduct such a sale file a sworn, itemized inventory with the county tax assessor-collector and receive a permit from that official effective for one hundred and twenty days. Fraudulent intent could also be inferred from proof that despite repeated promises to go out of business the defendant has yet to do so.<sup>119</sup>

18. *Prohibition against "referral selling."*<sup>120</sup> The consumer, after having explained that he cannot afford to make the purchase, is told that he will not have to pay anything or that he will receive a substantial credit on his purchase through "commissions" on every subsequent transaction between the seller and the consumer's friends. The DTPA apparently would not be violated if the seller, *at the time of sale*, agrees to reduce the price in exchange for the buyer's list of friends. The price reduction simply must not be contingent on whether the individuals named in the list subsequently grant a sales interview or ultimately purchase the seller's product.

19. *Representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve.*<sup>121</sup> The advertising of guarantees or warranties is governed by the same standards of honesty and truthfulness applied to any other promise or representation by a seller or lessor. The clearest case of unfairness and deception in this area occurs when the seller simply does not honor a guarantee. The seller will be held to his promise or run the risk of violating the law.<sup>122</sup> Further, a violation occurs if the seller advertises the product as guaranteed but subsequently delivers it with a guarantee at variance

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116. *Cf. Success Motivation Inst., Inc. v. Lawlis*, 503 S.W.2d 864, 870 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) (knowledge of falsity of untrue statement not essential element of fraud).

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

118. TEX. REV. CIV. STAT. ANN. art. 9011 (Supp. 1976-1977).

119. *Cf. Amsler, Corporations, Annual Survey of Texas Law*, 22 Sw. L.J. 59, 68 (1968) ("[A] business which advertises a 'going out of business sale' should have the simple decency to go out of business.").

120. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(18) (Supp. 1976-1977).

121. *Id.* § 17.46(b)(19).

122. *In re Universal Carpet Distrib. Co., v. FTC*, 57 F.T.C. 609 (1960).

with the guarantee promised.<sup>123</sup> Whether a warranty exists or not depends upon law outside the DTPA.<sup>124</sup> By its very terms,<sup>125</sup> the DTPA does not expand the implied warranty of merchantability under section 2.314 of the Texas Business and Commerce Code.

20. *Prohibition against "Pyramid" Sales.*<sup>126</sup> The term "pyramid sale" is derived from the diagrammatic shape of the marketing plan. At the top of the pyramid is the person or organization initiating the program. This person or organization sells to several persons below him in the chain the right to distribute the organization's product. In addition to buying the right to distribute the product, the purchaser also acquires the right to sell positions within the sales organization to others below him and to retain a percentage of the proceeds from the sale. The new recruits, in turn, sell to persons below them, causing each new level of sales to expand geometrically in relation to the level above.<sup>127</sup> In *Twentieth Century Co. v. Quilling*<sup>128</sup> the Wisconsin Supreme Court expressed the reasons that justify the prohibition against pyramid sales schemes:

[T]he real arrangement was a joint scheme to make money by selling similar nominal territorial rights to others who should also become parties to the scheme and sell similar territorial rights to still others, and so on . . . .

. . . [I]t will infallibly leave a greater or lesser crowd of dupes at the end with no opportunity to recoup their losses because the bubble has at last burst. It contemplates an endless chain of purchasers, or, rather, a series of constantly multiplying endless chains, with nothing but fading rainbows as the reward of those who are unfortunate enough to become purchasers the moment before the collapse of the scheme.<sup>129</sup>

123. *Coro, Inc. v. FTC*, 338 F.2d 149, 150-51 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). The FTC's Guides Against Deceptive Advertising of Guarantees, 16 C.F.R. 239 (1976), highlights the scope of this prohibition and provides further examples of its application.

124. See text accompanying notes 281-311 *infra* for a discussion of breach of warranty.

125. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(19) (Supp. 1976-1977).

126. *Id.* § 17.46(b)(20).

127. A good example of a pyramid sales scheme is provided by *Wesware, Inc. v. State*, 488 S.W.2d 844, 848-49 (Tex. Civ. App.—Austin 1972, no writ), an enforcement action under TEX. REV. CIV. STAT. ANN. art. 5069-10.01 to .08 (1971) (repealed 1973). In that case, the court held there was sufficient evidence to find a *per se* violation of the Deceptive Trade Practices Act in the operation of a pyramid sales scheme involving the marketing of stainless steel cookware, notwithstanding the fact that the scheme was fully explained, that there was no deception as to its nature, and that the only element of chance involved was that attendant to any business venture dependent upon the sales of goods.

128. 110 N.W. 174, 176 (Wis. 1907).

129. *Id.* at 176.

The inevitability of the market saturation makes the scheme deceptive.<sup>130</sup> Participants who buy in down the line are mathematically barred, not only from making a profit, but even from recouping their original investment.<sup>131</sup>

### C. Defenses

Except in one limited situation,<sup>132</sup> the DTPA provides no defenses to a suit brought under its provisions. Since only one kind of defense is specifically permitted by the DTPA, other possible defenses are apparently unavailable under the doctrine of *inclusio unius est exclusio alterius*. Even assuming the Consumer Protection Act itself does not foreclose their assertion, there are few, if any, viable defenses to assert. The decisions of the FTC and the federal courts, which are guiding precedent on Texas courts,<sup>133</sup> have substantially diluted, if not altogether destroyed, whatever defensive arguments a defendant might raise. Moreover, these defenses, whatever semblance of vitality they may seem to retain, are no answer to a violation of any of the "per se" items on the section 17.46(b) laundry list. Most of the "defenses" are not really defenses at all, but rather are matters that either purport to negative or attenuate the deceptiveness of a representation, which is an issue only under section 17.46(a), or are considerations that arguably allay the need for injunctive relief. Despite their weaknesses, these arguments are still raised by defendants and their lawyers in settlement negotiations and in court.

"It was only an innocent mistake." It has already been noted that, with few exceptions,<sup>134</sup> whether or not the defendant intended the conduct in question is immaterial.<sup>135</sup> The emphasis here, however, is on the availability of the affirmative defense of bona fide error. The answer is quite simple. Bona fide error is available only in a *private* suit brought as a *class action*.<sup>136</sup> It may neither be asserted in an individual

130. State v. ITM, Inc., 275 N.Y.S.2d 303 (Sup. Ct. App. Div. 1966).

131. Kugler v. Koscot Interplanetary, Inc., 293 A.2d 682, 706 (N.J. 1972).

132. See text accompanying notes 134-42 *infra* for a discussion of the defense of "bona fide error" in class action suits. See text accompanying notes 400-04 *infra*.

133. TEX. BUS. & COMM. CODE ANN. §§ 17.46(c), .49 (Supp. 1976-1977); see State v. Credit Bureau, Inc., 530 S.W.2d 288, 293 (1975); Wesware, Inc. v. State, 488 S.W.2d 844, 848 (Tex. Civ. App.—Austin 1972, no writ). In Vargas v. Allied Fin. Co., 545 S.W.2d 231 (Tex. Civ. App.—Tyler 1977, writ filed), an FTC venue ruling was held inapplicable because all litigation in Texas is controlled by venue statutes.

134. See text accompanying notes 87-89, 106, 114 *supra*.

135. See notes 48, 49 *supra* & accompanying text for a discussion of intent.

136. TEX. BUS. & COMM. CODE ANN. § 17.54 (Supp. 1976-1977) provides:

*private* consumer suit under section 17.50<sup>137</sup> nor in a public enforcement action under sections 17.47 or 17.48.<sup>138</sup>

Even in class action suits, the defense is available only if the defendant meets two requirements. First, he must show that the violation resulted from a bona fide, innocent, or unintentional error that occurred despite the previous implementation of reasonable procedures adopted to avoid that very error.<sup>139</sup> In other words, bona fide error as a defense is available only if the defendant can first show his use of reasonable procedures designed to prevent the error that resulted in the violation in question.<sup>140</sup> Second, the defendant must restore to the class members all consideration received from them.<sup>141</sup> Finally, even in a class action suit, bona fide error is only a defense against a damages claim and not against a claim for an injunction.<sup>142</sup>

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No award of damages may be given in any action filed under Section 17.51 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.

A similar provision appears in TEX. INS. CODE ANN. art. 21.21, § 20 (Pamp. Supp. 1975-1976). See text accompanying note 402 *infra*.

137. TEX. BUS. & COMM. CODE ANN. § 17.50 (Supp. 1976-1977); see Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656, 661-62 (Tex. Civ. App.—Amarillo 1975, no writ), in which the court denied the claim of a defendant in an individual private consumer action under the DTPA that he was denied due process of law since he was deprived of a defense accorded defendants in class action suits.

138. In view of the result in Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo, no writ), and of the DTPA's specific limitation of the defense to class action cases, the defense is clearly unavailable in suits brought by the Attorney General or by district or county attorneys. TEX. BUS. & COMM. CODE ANN. §§ 17.47, .49 (Supp. 1976-1977).

139. *Id.* § 17.54(1).

140. *Cf.* Central Adjustment Bureau, Inc. v. Gonzales, 528 S.W.2d 314, 316 (Tex. Civ. App.—San Antonio 1975, no writ), construing similar language in the Texas Debt Collection Practices Act, TEX. REV. CIV. STAT. ANN. art. 5069-11.08 (Supp. 1976-1977).

141. TEX. BUS. & COMM. CODE ANN. § 17.54(2) (Supp. 1976-1977).

142. *Id.* § 17.54. While a discussion of class actions under the DTPA is outside the scope of this article, it should be pointed out that in addition to the fact that the bona fide error defense is available in class actions only, several other distinctions exist between individual and class actions under the DTPA. First, while treble damages are available in individual actions, only actual damages are available in class actions. Compare *id.* § 17.50(b)(1), with *id.* § 17.51(b)(1). Second, class actions under the DTPA are limited to: (1) violations of § 17.46(b); (2) violations of article 21.21 of the Texas Insurance Code or Texas Board of Insurance rules and regulations promulgated thereunder; or (3) an act or practice declared unlawful or deceptive by an officially reported decision of a Texas appellate court. Individual actions only are available for: (1) violations of § 17.46(a); (2) an unconscionable action or course of action; (3) failure to comply with an express or implied warranty. Compare *id.* § 17.51(a), with *id.* § 17.50(a). See also the discussion of the consumer's four causes of action commencing note 281 *infra*.

Further, there are several procedural impediments to bringing a class action. The re-



"I've already stopped the practice voluntarily." Voluntary discontinuance of the unlawful conduct, of course, is irrelevant to the defendant's civil penalty or damage liability for past wrongs. The only issue to which discontinuance is even arguably germane is the need for an injunction. The DTPA disposes of this issue by its mandate that "injunctive relief shall lie even if [the defendant] has ceased such unlawful conduct after . . . prior contact [by the Division]."<sup>143</sup> The FTC has consistently rejected this defense because there is no guarantee that the practice *will not* resume.<sup>144</sup>

"I finally told the consumer the truth before he paid me." As two commentators have noted, "[c]onfession may be good for the soul, but it does not cleanse the advertiser of the consequences of his 'come-on' advertisements."<sup>145</sup> If the first contact between the defendant and the buyer occurs as the result of a deceptive trade practice, the defendant is liable even though the buyer later becomes fully informed before entering into the contract.<sup>146</sup>

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quirements for certification and notification to class members parallel those of FED. R. CIV. P. 23, but the notification provisions are more stringent in § 17.52. Compare TEX. BUS. & COMM. CODE ANN. § 17.52(e) (Supp. 1976-1977), with FED. R. CIV. P. 23(c). Also, in a consumer class action seeking damages, at least 30 days prior to commencement of suit, the consumer must notify defendant of his complaint and make demand for relief for himself and all consumers similarly situated. TEX. BUS. & COMM. CODE ANN. § 17.53(a), (c) (Supp. 1976-1977). No damages may be awarded in the class action if, within 30 days after receiving the demand, the defendant makes a written offer of settlement complying with § 17.53(d).

TEX. INS. CODE ANN. art. 21.21, § 17 (Pamp. Supp. 1975-1976) sets forth an independent class action procedure for persons injured by an act or practice defined as unlawful by § 4 of article 21.21 or rules and regulations promulgated thereunder, or for an act or practice defined as a deceptive trade practice by § 17.46 of the Consumer Protection Act. The differences between individual and class actions under the DTPA parallel the differences between individual and class actions under article 21.21 of the Texas Insurance Code. Compare TEX. INS. CODE ANN. § 16 (Pamp. Supp. 1975-1976), with *id.* §§ 17, 18, and *id.* § 19. See also the discussion of private actions under article 21.21 text at notes 326-68 *infra*.

For a comprehensive discussion of class actions under the DTPA see Comment, *The Texas Consumer Class Action*, 16 S. TEX. L.J. 111 (1974). See also McElroy, *Class Action Practice in Texas State Courts*, 39 TEX. B.J. 321 (1976).

143. TEX. BUS. & COMM. CODE ANN. § 17.47(a) (Supp. 1976-1977).

144. *Goodman v. FTC*, 244 F.2d 584, 593 (9th Cir. 1957); *Standard Distribs., Inc. v. FTC*, 211 F.2d 7, 14-16 (2d Cir. 1954); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952); *Oregon-Washington Plywood Co. v. FTC*, 194 F.2d 48, 50-51 (9th Cir. 1952); *Consolidated Royal Chem. Corp. v. FTC*, 191 F.2d 896, 900 (7th Cir. 1951).

145. 2 G. ROSDEN & P. ROSDEN, *THE LAW OF ADVERTISING* § 18.06(2) (1976).

146. *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 969 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 41 (1975); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Book-of-the-Month Club, Inc. v. FTC*, 202 F.2d 486, 488-89 (2d Cir.), *cert. dismissed*, 346 U.S. 883 (1953).

"I was only 'puffing.'" In the common law of fraud, "[t]he 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk."<sup>147</sup> Under modern deceptive trade practice law, however, the standard is not that of the reasonable man but, rather, is that of the "ignorant, the unthinking and the credulous."<sup>148</sup> The FTC's view, and hence the DTPA's view, of puffing is very narrow:

Puffing, as we understand it, is a term frequently used to denote exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined. In contrast thereto, the representation as to "the world's lowest price" is a statement of objective actuality, the truth or falsity of which is not variable and can be ascertained with factual precision. This representation cannot, therefore, properly be termed 'puffing.' It is either true, or it is false . . . .<sup>149</sup>

The final result is that a claim of exaggeration will likely be unsuccessful in a deceptive trade practice suit.<sup>150</sup>

"But everyone else is doing it." Defendants have sought to avoid FTC enforcement actions on the grounds that, since a cease and desist order would place them at a competitive disadvantage as against others employing the same practice, the Commission should proceed on an industry-wide basis through rulemaking.<sup>151</sup> The argument might have some cogency under the DTPA if the Consumer Protection Division, like the FTC, had rulemaking power. But even the FTC has rejected this contention in numerous cases.<sup>152</sup> Moreover, the argument that compliance with the law will cause a loss in profits is not only immaterial,<sup>153</sup> it is not particularly attractive.

147. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 109, at 723 (4th ed. 1971); see, e.g., *Saunders v. Martin*, 390 S.W.2d 513, 515-16 (Tex. Civ. App.—Texarkana 1965, no writ); 25 Tex. Jur. 2d *Fraud and Deceit* § 47 (1961).

148. See note 45 *supra* and accompanying text.

149. *In re Better Living, Inc.*, 54 F.T.C. 648, 653 (1957), *aff'd*, 259 F.2d 271 (3d Cir. 1958).

150. See 2 G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING § 18.06(4) (1976): "The word 'puffing' has been expurgated from the index of the Federal Trade Commission [and is] rarely recognized as permissible by the Commission." See also [1975] 2 TRADE REG. REP. (CCH) ¶ 7533.

151. See, e.g., *In re Max Factor & Co.*, 66 F.T.C. 184, 251 (1964).

152. See, e.g., *P.F. Collier & Son v. FTC*, 427 F.2d 261 (6th Cir. 1970); *International Art Co. v. FTC*, 109 F.2d 393 (7th Cir. 1940) (fact that unfair practice employed by competitors immaterial); *National Candy Co. v. FTC*, 104 F.2d 999 (7th Cir. 1939).

153. Such evidence would be relevant only if the court were permitted to "balance the equities" in a suit to enjoin a deceptive trade practice. "Balancing of the equities" is not permitted in such cases. See authorities cited note 224 *infra*.

"No one was hurt" or "What the consumer got was as good as what I promised him." This defense is a dead letter. That the consumer received an equivalent value<sup>154</sup> or a bargain,<sup>155</sup> that he suffered no damage,<sup>156</sup> or that he was satisfied<sup>157</sup> is immaterial. Indeed, it makes no difference that the persons victimized by the unlawful conduct do not reside in Texas provided the defendant engages in any conduct in Texas in furtherance of a practice prohibited by the DTPA.<sup>158</sup>

"I did not commit or authorize the violative conduct." This defense, too, is a dead letter. Where the deceptive trade practices are committed within the apparent scope of the authority of an agent, the principal will be held liable even though the conduct was not authorized or was even prohibited by the principal.<sup>159</sup> Similarly, a person who places in the hands of another a means of consummating a deceptive trade practice is himself guilty of violating the DTPA.<sup>160</sup> Likewise, those persons who

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154. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

155. *National Silver Co. v. FTC*, 88 F.2d 425, 427 (2d Cir. 1937).

156. *National Harness Mfrs. Ass'n v. FTC*, 268 F. 705, 712 (6th Cir. 1920).

157. *Erickson v. FTC*, 272 F.2d 318, 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 940 (1960).

158. *See Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 921-22 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.), wherein defendants sought to avoid the registration and antifraud provisions of the Texas Securities Act on the grounds that they sold their securities only to nonresidents. The court rejected this contention and held instead that if any act in the selling process occurs in Texas, the Texas Securities Act applies. The court noted that "[a] state is damaged if its citizens are permitted to engage in fraudulent practices even though those injured are outside its borders." *Id.* at 921. Like the Securities Act, which regulates "fraudulent practices," the Consumer Protection Act regulates "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." TEX. BUS. & COMM. CODE ANN. § 17.46(a) (Supp. 1976-1977). "Trade" and "commerce" are broadly defined to include any "advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state." *Id.* § 17.45(b) (emphasis added). Texans and the Texas economy would undoubtedly be affected if the state stood idly by and permitted itself to become a haven for interstate traffickers in fraudulent schemes. The influx of capital into the state from nonresident investors and buyers would quickly dwindle once they learned that Texas businesses could not be trusted. Similarly, consumer protection officials in other states would presumably be less inclined to protect Texas citizens against fraudulent schemers operating out of their states if they could not depend on reciprocal efforts by Texas officials. *See Brown v. Market Dev., Inc.*, 322 N.E.2d 367, 369 (Ohio Misc. 1974) (Ohio's Consumer Protection Act applied to resident defendant's fraudulent conduct even though no victims resided in Ohio).

159. *See Shafe v. FTC*, 256 F.2d 661, 664 (6th Cir. 1958); *Goodman v. FTC*, 244 F.2d 584, 594 (9th Cir. 1957); *Standard Distribs., Inc. v. FTC*, 211 F.2d 7, 11 (2d Cir. 1954); *Parke, Austin & Lipscomb, Inc. v. FTC*, 142 F.2d 437, 440 (2d Cir.), *cert. denied*, 323 U.S. 753-54 (1944); *Perma-Maid Co. v. FTC*, 121 F.2d 282, 284 (6th Cir. 1941); *In re Star Office Supply Co.*, 77 F.T.C. 383, 444 (1970).

160. *See FTC v. Winstead Hosiery Co.*, 258 U.S. 483, 494 (1922); *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

either own or control a corporation will be held personally liable for the deceptive trade practices committed by the corporation through its agents.<sup>161</sup> As stated by the Court of Appeals for the District of Columbia in a recent case, "[a] heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception."<sup>162</sup>

Another basis for personal liability for the deceptive trade practices of others is civil conspiracy. If a person is shown by direct or circumstantial evidence to have entered into "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,"<sup>163</sup> that person will be held jointly and severally liable with the rest of the conspirators for all acts committed in furtherance of the conspiracy.<sup>164</sup>

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161. *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 120 (1937); *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 402-03 (D.C. Cir.) (per curiam), cert. denied, 414 U.S. 828 (1973); *Dlutz v. FTC*, 406 F.2d 227 (3d Cir.) (per curiam), cert. denied, 395 U.S. 936 (1969); *Benrus Watch Co., Inc. v. FTC*, 352 F.2d 313, 324-25 (8th Cir. 1965); *Pati-Port, Inc. v. FTC*, 313 F.2d 103, 105 (4th Cir. 1963); *Standard Distribs., Inc. v. FTC*, 211 F.2d 7, 14-15 (2d Cir. 1954). In *Standard Distributors* Judge Learned Hand declared:

It is indeed true that this results in holding such an officer responsible for the conduct of those who are not his agents; and, moreover, that it deprives him of the immunity that the incorporation of a venture ordinarily gives to the incorporators. However, we do not see that this any severer a responsibility than that of a principal for the conduct of his agent within the scope of an "apparent authority" that he may have done his best to circumscribe. . . . [S]ince the principal has selected the agent to act in a venture in which the principal is interested, it is fair, as between him and a third person, to impose upon him the risk that the agent may exceed his instructions. . . . Much of the same argument seems to us permissible, when, as here, no agency exists. Bimstein [president of the corporation] had the entire control over what the salesman should do and say, so far as any control was possible at all; and the order imposes no greater burden on him than it would have, if he had been a former principal; for the salesman did not exceed their "apparent authority."

211 F.2d at 15. *United States v. Wise*, 370 U.S. 405 (1962), held that all corporate officers who knowingly participate in violations of the penal provisions of the Sherman Act are subject to criminal prosecution whether or not they authorize, order, or help perpetrate the crime. *Id.* at 416. For a discussion of the significantly heavier burden of "piercing the corporate veil" in Texas, see Howell, *Piercing the Corporate Veil*, 11 TEX. TRIAL LAW. F. 25 (1977).

162. *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir.) (per curiam), cert. denied, 414 U.S. 828 (1973). Judge Wilkey wrote a strong dissent accusing the FTC and the majority of having "carved a new niche in the law for 'guilt by office' and 'guilt by association,'" saddling the corporate owner with a "'heavy burden of exculpation' even though no inculcating evidence (beyond mere ownership and control—which is not enough) has been introduced!" *Id.* at 408 (emphasis in original). The majority's decision, with all due respect to Judge Wilkey, however, is entirely consistent with past precedent. See authorities cited note 164 *infra*. See also Howell, *Piercing the Corporate Veil*, 11 TEX. TRIAL LAW. F. 25 (1977).

163. *Bourland v. State*, 528 S.W.2d 350, 355 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

164. *Massey v. Farnsworth*, 353 S.W.2d 262, 271 (Tex. Civ. App.—Houston 1961),

*"You can't sue me because I'm already regulated by another agency."* This "defense" is also without merit. There were broad exemptions under the old deceptive trade practices legislation. The prohibitions of the prior deceptive trade practices act<sup>165</sup> did not apply to the insurance industry;<sup>166</sup> to any action or transaction "permitted under laws administered by a public official acting under statutory authority of this State or the United States;"<sup>167</sup> to any act or practice "which is subject to and which complies with, the rules and regulations of, and the statutes administered by, the Federal Trade Commission;"<sup>168</sup> or to any advertising medium unless it could be shown that the medium "had knowledge of the intent, design, or purpose of the advertiser at the time of publication or dissemination."<sup>169</sup>

In passing the DTPA, the legislature abandoned this broad exclusionary language. First, the only class retaining a general exemption is the advertising media, but even they can be held liable if they either know of the unlawful conduct or have a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service.<sup>170</sup> Second, the only conduct exempted is that specifically authorized by a rule or regulation of the FTC.<sup>171</sup> The insurance industry lost its broad exemption, though suits by the Consumer Protection Division against "a licensed insurer or insurance agent" can be brought "only on the written request of the State Board of Insurance or the commissioner of insurance."<sup>172</sup>

Just preceding the final vote in the House, there were two eleventh hour efforts to enlarge the substantially narrowed exemption provision. The first would have given the Texas Real Estate Commission "prior

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*rev'd on other grounds*, 365 S.W.2d 1 (Tex. 1963); cf. TEX. BUS. & COMM. CODE ANN. § 17.59(b) (Supp. 1976-1977), imposing joint and several liability on all persons who knowingly participated in the unlawful enterprise with respect to all consumer claims remaining unsatisfied after distribution of enterprise assets. See generally 12 Tex. Jur. 2d *Conspiracy* § 17 (1960).

165. TEX. REV. CIV. STAT. ANN. art. 5069-10.03 (1971) (repealed 1973).

166. *Id.* art. 5069-10.03(d) (repealed 1973).

167. *Id.* art. 5069-10.03(a) (repealed 1973).

168. *Id.* art. 5069-10.03(c) (repealed 1973).

169. *Id.* art. 5069-10.03(b) (repealed 1973).

170. TEX. BUS. & COMM. CODE ANN. § 17.49(a) (Supp. 1976-1977). Furthermore, while the old exemption was open-ended, the new exemption covers the owners and employees of an exclusive list: any "regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard." *Id.* § 17.49(a) (emphasis added).

171. *Id.* § 17.49(b).

172. *Id.* § 17.47(a). The insurance industry's "loss" of its exemption may have been more apparent than real. In the three and one-half years since passage of the Act the State Board of Insurance has not requested a single enforcement action.

jurisdiction [of all deceptive trade practices committed by any] licensed real estate broker or salesman."<sup>173</sup> No suit could be brought against such a broker or salesman "until such acts or conduct complained of shall have first been received and finally determined in accordance with the provisions of the Texas Real Estate Act."<sup>174</sup> The second effort would have exempted "any individual practicing his or her profession only licensed by the State of Texas to practice a recognized profession in this state."<sup>175</sup> While the syntax is somewhat confusing, this proposal would have clearly exempted doctors<sup>176</sup> and lawyers,<sup>177</sup> and numerous other professionals. Both proposals, however, were tabled.<sup>178</sup> In light of this legislative history, it is inconceivable that the DTPA was intended to apply only to "unregulated" persons and businesses. To extinguish any lingering doubt, however, the legislature provided that "the remedies provided in this subchapter are *in addition to* any other procedures or remedies provided for in any other law."<sup>179</sup> The DTPA, in other words, is supplementary to all other laws.<sup>180</sup>

Finally, the DTPA provides that it is to be "liberally construed . . . to protect consumers against false, misleading, and deceptive business

173. TEX. H.R.J. 2114, 2114-15 (1973).

174. *Id.* at 2114-15.

175. *Id.* at 2115.

176. TEX. REV. CIV. STAT. ANN. art. 4498a (1976).

177. *Id.* art. 320a-1, § 3 (Supp. 1976-1977); *cf.* *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785-88 (1975). The court in *Goldfarb* rejected the bar's argument that Congress never intended to include the "learned professions" within the terms "trade or commerce" in § 1 of the Sherman Act, 15 U.S.C. § 1 (1970). The bar contended that "competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community." 421 U.S. at 786. To be sure, service to the community *is*, or *should be*, the principal goal of the legal profession, but how the goal is disserved by competition or promoted by price fixing is somewhat difficult to discern. Apparently, the Supreme Court felt the same way. In any event, the *Goldfarb* case, in addition to the general reasons discussed in the text, supports the application of the DTPA to lawyers, since the DTPA, like the Sherman Act, applies to "acts or practices in the conduct of any *trade or commerce*." TEX. BUS. & COMM. CODE ANN. § 17.46(a) (Supp. 1976-1977) (emphasis added). Of course, the broad definition of "trade" or "commerce" contained in § 17.45(b) would clearly cover legal services. *Id.* § 17.45(b).

178. TEX. H.R.J. 2114, 2114-15 (1973).

179. TEX. BUS. & COMM. CODE ANN. § 17.43 (Supp. 1976-1977) (emphasis added).

180. *Cf.* *Texas State Bd. of Pharmacy v. Gibson's Discount Center, Inc.*, 541 S.W.2d 884, 887 (Tex. Civ. App.—Austin 1976, writ filed). In sustaining the plaintiffs' constitutional attack on the Board's prescription drug advertising ban and rejecting the Board's argument that such a ban was necessary to prevent "unfair or deceptive competitive practices," the court stated, "[i]t occurs to us that Texas Bus. and Comm. Code Ann. § 17.41 *et seq.*, the 'Deceptive Trade Practices-Consumer Protection Act,' more effectively controls false, misleading, or deceptive trade practices than does a blanket prohibition against *all* advertising of drugs." *Id.* at 887.

practices."<sup>181</sup> Any construction of the DTPA that would forestall its enforcement because of the existence of other laws or agencies would run counter to this policy and must be rejected.

### III. THE ROLE OF THE ATTORNEY GENERAL: FUNCTIONS, POWERS, AND POLICIES

#### A. General Observations

The attorney general maintains six regional Consumer Protection Division offices<sup>182</sup> and a central office in Austin. Each office deals directly with the public, performing essentially two functions: mediation of consumer complaints and litigation of deceptive trade practice cases.

Once a complaint is filed, the Division contacts the alleged wrongdoer to elicit his side of the controversy. In the majority of cases, the intercession of the Division opens lines of communication and leads to a resolution of the complaint satisfactory to both parties. If a legitimate complaint involving a violation of the DTPA cannot be resolved through mediation, the Division either initiates litigation or refers the complainant to a private attorney for initiation of a private cause of action under the DTPA.<sup>183</sup> With a limited staff and budget,<sup>184</sup> it is clear the Division cannot go to court over every complaint. This is precisely why the legislature provided the remedy of treble damages<sup>185</sup> in private causes of action—to obviate the need for a massive state bureaucracy by placing an effective remedy for consumer abuse in the hands of the abused.

While there are no hard and fast rules or regulations governing when the Division will sue, several factors play a role: the number of complaints against the particular individual or business concern; the severity of the case, either in terms of economic loss to consumers or in terms of the number and gravity of law violations; the past history of the defendant with the Attorney General's Office or with other consumer protection agencies; and the possibility of halting a fraudulent scheme before a large segment of the public is harmed.<sup>186</sup>

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181. TEX. BUS. & COMM. CODE ANN. § 17.42 (Supp. 1976-1977).

182. The six regional offices are located in Houston, Dallas, San Antonio, El Paso, Lubbock, and McAllen.

183. TEX. BUS. & COMM. CODE ANN. § 17.50 (Supp. 1976-1977).

184. There is a total of 19 lawyers in the Consumer Protection Division statewide. In the nine months from January to September 1976 the Division received 12,507 complaints, filed 65 lawsuits and accepted 19 voluntary assurances.

185. TEX. BUS. & COMM. CODE ANN. § 17.50 (Supp. 1976-1977).

186. The public interest is obviously best served by lawsuits that halt fraudulent oper-

There is no requirement that any complaint be filed with the Division as a prerequisite to maintaining a cause of action. The Consumer Protection Act requires only that the Division have "reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful . . . and that the proceedings . . . be in the public interest."<sup>187</sup> Consequently, the Division frequently initiates investigations *sua sponte* in an effort to uncover unlawful activity in its incipency before any significant harm results to the buying or investing public.

#### B. Investigative powers

The Attorney General's Office has four specific statutory tools to investigate whether the DTPA has been, or is about to be, violated. Two of these tools are contained in the DTPA itself. Section 17.60 authorizes the Division to require a person to file with the Division a sworn statement as to the facts surrounding an alleged violation of the DTPA, including any other data or information the Division deems necessary;<sup>188</sup> examine persons under oath;<sup>189</sup> "examine any merchandise or sample of merchandise deemed necessary and proper;"<sup>190</sup> and seek a court order impounding any sample of merchandise which may then be retained by the Division until completion of its own investigation or prosecution.<sup>191</sup> Since it authorizes the examination of a person under oath and imposes the requirement that a person file with the Division all data and information the Division deems necessary, section 17.60 effectively grants to the Division the power to subpoena any person to appear for the taking of an oral deposition and to bring with him all books, records, and other documentary information the Division reasonably believes necessary to investigate possible violations of the DTPA. As a general rule, however, the Division employs this section for the more limited purpose of issuing "17.60 letters." These "letters" contain specific questions which

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ations before injury becomes widespread. Private lawsuits are unable to fill this need because their emphasis is most often on redress for past wrongs. Even where the private litigant desires injunctive relief, he simply may be unable to afford to post a bond. TEX. R. CIV. P. 684. By contrast, the state is not required to post a bond to secure injunctive relief. TEX. BUS. & COMM. CODE ANN. § 17.47(b) (Supp. 1976-1977). Moreover, except in a class action brought under § 17.51, an injunction would be legally effective to protect only the private party bringing the action and not the general public.

187. TEX. BUS. & COMM. CODE ANN. § 17.47(a) (Supp. 1976-1977).

188. *Id.* § 17.60(1).

189. *Id.* § 17.60(2).

190. *Id.* § 17.60(3).

191. *Id.* § 17.60(4).



the respondent must answer under oath within a specified period of time, usually varying from ten days to two weeks.

The second investigative tool given the Division by the DTPA is the section 17.61 "civil investigative demand." Section 17.61 provides that an authorized agent of the Division may prepare a written demand to any person to produce for inspection and copying "documentary material relevant to the subject matter of an investigation of a possible violation"<sup>192</sup> of the DTPA. The demand must state the statute and section under which the alleged violation is being investigated, and the general subject matter of the investigation;<sup>193</sup> specifically describe the documentary material sought;<sup>194</sup> prescribe a period for production of the material;<sup>195</sup> and identify the members of the Division to whom the material is to be made available.<sup>196</sup>

The recipient of the demand may, at any time within twenty days after service, file a petition in district court to extend the return date or to modify or set aside the demand upon a showing of "good cause."<sup>197</sup> There is no similar right to challenge an investigation under section 17.60.

If there is any failure to comply with sections 17.60 or 17.61, the Division may seek an enforcement order from a district court,<sup>198</sup> which may then be appealed directly to the Texas Supreme Court.<sup>199</sup> Moreover, it is a misdemeanor punishable by a five thousand dollar fine or a year in jail or both for anyone "with intent to avoid, evade, or prevent compliance, in whole or in part, with Section 17.60 or 17.61,"<sup>200</sup> to remove from any place, conceal, withhold, or destroy, mutilate, alter, or by any other means falsify any documentary material or merchandise.<sup>201</sup>

Authority to implement the attorney general's third and fourth investigative tools, the "visitorial letter" and the "court of inquiry," lies outside the DTPA itself. The Miscellaneous Corporations Laws Act<sup>202</sup> imposes the duty on every domestic or foreign corporation doing business in the state to permit the attorney general or his designated representative to

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192. *Id.* § 17.61(a).

193. *Id.* § 17.61(b)(1).

194. *Id.* § 17.61(b)(2).

195. *Id.* § 17.61(b)(3).

196. *Id.* § 17.61(b)(4).

197. *Id.* § 17.61(g).

198. *Id.* § 17.62(b).

199. *Id.* § 17.62(c).

200. *Id.* § 17.62(a).

201. *Id.* § 17.62(a).

202. TEX. REV. CIV. STAT. ANN. art. 1302-1.01 to -6.26 (1962).

examine all "books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws, and other records of said corporation as he may deem necessary."<sup>203</sup> A written request, commonly referred to as a "visitorial letter," is delivered to the president or other officer of the corporation at the time of the inspection.<sup>204</sup> Upon receiving the letter, the officer or agent must immediately permit the examination to proceed.<sup>205</sup> The attorney general, or his representative, is additionally authorized to investigate the organization, conduct, and management of any corporation authorized to do business in the state and to examine and copy whatever books, records, or other documents "as in his judgment may show or tend to show said corporation has been or is engaged in acts or conduct in violation of its charter . . . or . . . of any laws of this State."<sup>206</sup>

Refusal to comply with such investigatory requests results in forfeiture of the corporation's charter or of its permit to do business.<sup>207</sup> Further, the corporate officer or agent who refuses to comply is subject to a criminal fine of from one hundred to one thousand dollars and a jail sentence of from thirty to one hundred days.<sup>208</sup> Each day the officer or agent refuses to comply is a separate offense.<sup>209</sup>

Since a great deal of consumer fraud is perpetrated through the corporate vehicle, the visitorial letter provides substantial aid to the Division in its investigation of possible violations of the Consumer Protection Act. Unlike the section 17.61 "civil investigative demand," the more stringent visitorial letter procedure requires no prior notice and mandates immediate compliance. Additionally, while the recipient of a "civil investigative demand" may, upon a showing of good cause, secure a court order setting aside the demand *a priori*, the corporate recipient of a visitorial letter is provided no similar right.

The final investigative tool is the court of inquiry, which may be convened by a county or district judge "acting in his capacity as magistrate [when he] has good cause to believe that an offense has been committed against the laws of this state."<sup>210</sup> Although provision is made for introduction of evidence by affidavit and written interrogato-

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203. *Id.* art. 1302-5.01A.

204. *Id.* art. 1302-5.02A.

205. *Id.* art. 1302-5.02A.

206. *Id.* art. 1302-5.03A.

207. *Id.* art. 1302-5.05A.

208. *Id.* art. 1302-5.05B (Supp. 1976-1977).

209. *Id.* art. 1302-5.05B (Supp. 1976-1977).

210. TEX. CODE CRIM. PROC. ANN. art. 52.01 (Supp. 1976-1977).

ry,<sup>211</sup> courts of inquiry are typically conducted like formal trials with testimony adduced orally by examination with the proceedings being transcribed. The major difference between the proceedings in a court of inquiry and those in a trial is that technical rules of evidence need not apply in courts of inquiry; evidence is deemed admissible at the discretion of the court.<sup>212</sup>

Once a request to convene a court of inquiry has been granted, the magistrate typically authorizes the attorney general's representative to act effectively as a special prosecutor, examining the witnesses and generally conducting the investigation.

The court of inquiry is an extremely useful tool since subpoenas to appear, give testimony, and produce documents may be issued by the court to persons located anywhere in the state.<sup>213</sup> Thus, a statewide fraud investigation that otherwise would take several attorneys or investigators many weeks or even months to complete can be handled by fewer personnel in less time. Further, the court conducting a court of inquiry has specific authority to compel testimony over a fifth amendment objection by granting immunity from prosecution, penalty, or forfeiture "for, or on account of, any transaction matter or thing concerning which he may be compelled to testify or produce evidence."<sup>214</sup> This immunity provision clearly increases the likelihood of securing insider testimony which can prove crucial in fraud investigations.

The practical usefulness of the court of inquiry, however, should not be overestimated. A crowded docket may make district and county courts reluctant to take on voluntarily what could well result in a lengthy investigatory proceeding. Further, the fact that all proceedings are open to the public<sup>215</sup> decreases the utility of the court of inquiry in those cases where the effectiveness of an investigation depends on its secrecy.

### C. Litigation

1. *Jurisdiction and venue.* The Division may bring suit in the district court in the county where the defendant resides, where he has his principal place of business, where he is doing business, where the transaction occurred, or with the consent of the parties, in Travis

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211. *Id.* art. 52.02.

212. *Id.* art. 52.02.

213. *Id.* art. 52.03.

214. *Id.* art. 52.05.

215. *Id.* art. 52.07 (1966).

County.<sup>216</sup> By contrast, venue for private consumer actions under the DTPA lies only where the defendant resides, has his principal place of business, or is doing business.<sup>217</sup>

The "doing business" provision is a novel venue feature for Texas, and no specific test of doing business is provided in the DTPA. Obviously, doing business requires a lesser showing of activity than does principal place of business, which is made a separate basis for venue. A suggested approach is to employ the minimum contacts test utilized in determining whether Texas may exercise jurisdiction over a non-resident defendant.<sup>218</sup> This approach commends itself not only because Texas' long-arm statute also uses the term doing business,<sup>219</sup> but also because the minimum contacts test, by definition, ensures that the defendant is accorded fundamental fairness in the designation of a forum for suit.

2. *Pre-filing notice to defendant.* The DTPA provides that: Nothing herein shall require the consumer protection division to notify [the] person [against whom litigation is contemplated] that court action is or may be under consideration [but that] the consumer protection division shall, at least seven days prior to instituting such court action, contact such person to inform him in general of the alleged unlawful conduct.<sup>220</sup>

In short, the prior notice called for by the DTPA need include only a general statement of the conduct considered unlawful, and need not include a declaration that the Division intends to bring suit. Even this general notice of unlawful conduct need not be given if "in the opinion of the consumer protection division, there is good cause to believe that such person would evade service of process if prior contact were made or that such person would destroy relevant records if prior contact were made."<sup>221</sup>

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216. TEX. BUS. & COMM. CODE ANN. § 17.47(b) (Supp. 1976-1977). A proposed amendment passed the Texas Senate March 30, 1977 which changed the "is doing business" language to "has done business" in both the public enforcement section, § 17.47, and in the private venue section, § 17.56. In addition, the amendment would make clear that neither the State nor a private plaintiff need prove a prima facie cause of action in order to maintain venue under the public or private venue section. See text accompanying note 396 *infra*.

217. *Id.* § 17.56.

218. See, e.g., O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966); Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

219. TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964). It should be noted that where an out-of-state defendant is sued under the DTPA, jurisdiction can also be invoked pursuant to TEX. R. CIV. P. 108.

220. TEX. BUS. & COMM. CODE ANN. § 17.47(a) (Supp. 1976-1977).

221. *Id.*

### 3. Remedies.

a. *Injunctions.* The DTPA authorizes the Division to seek, without posting bond, temporary and permanent injunctive relief to restrain violations of the DTPA.<sup>222</sup> Unlike the requirements for a common law injunction, there is no inquiry under the DTPA into injury to the state or to the public generally,<sup>223</sup> and no effort is made to balance the equities between the state and the defendant.<sup>224</sup> The state need show only a violation of the law for an injunction to issue.<sup>225</sup> As noted, an injunction cannot be defeated by a mere showing that the defendant ceased his unlawful conduct after notification,<sup>226</sup> since the Consumer Protection Act provides that "injunctive relief *shall lie* even if [the defendant] has ceased[his] unlawful conduct after . . . prior contact [by the Division]."<sup>227</sup>

The general policy of the Division is first to seek a temporary restraining order, followed by a temporary and then a permanent injunction. Temporary restraining orders are sought for two reasons. The primary reason is to prevent further harm to the public from deceptive

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222. *Id.* In addition to *prohibitory* injunctions, the Division often seeks *mandatory* injunctions. Generally, the latter are used to require defendants to disclose material facts or to correct erroneous impressions left in the public's minds by the defendant's deceptive representations. For discussions of the FTC's use of mandatory disclosure orders, see Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693 (1976); Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1 (1973); Comment, *Corrective Advertising—The New Response to Consumer Deception*, 72 COLUM. L. REV. 415 (1972); Comment, *Corrective Advertising: The FTC's New Formula for Effective Relief*, 50 TEXAS L. REV. 312 (1972).

223. *Cf.* *Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 921 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (injunction under Texas Securities Act does not require probable injury to state); *City of Galveston v. State*, 518 S.W.2d 413, 419 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (degree of harm caused to city irrelevant in statutory cause of action); *Houston Compressed Steel Corp. v. State*, 456 S.W.2d 768, 775 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (State Board of Air Control entitled to injunction upon proof of statutory violation; proof of injury not required).

224. *Cf.* *Texas Pet Foods, Inc. v. State*, 529 S.W.2d 820, 830 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.) (balancing equities not required if continuing violation of statute shown); *City of Galveston v. State*, 518 S.W.2d 413, 419 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (examination of equities irrelevant once statutory violation established).

225. See authorities cited note 223 *supra*.

226. *Cf.* *Goodman v. FTC*, 244 F.2d 584, 593 (9th Cir. 1957) (cease and desist orders sustained even if deceptive practices abandoned); *Texas Pet Foods, Inc. v. State*, 529 S.W.2d 820, 827 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.) (declaration of intent to abandon former actionable practices does not preclude injunction).

227. TEX. BUS. & COMM. CODE ANN. § 17.47(a) (Supp. 1976-1977) (emphasis added).

trade practices. This goal can best be achieved by a temporary restraining order immediately restraining the defendant from further unlawful conduct. In many instances the Division is suing the traveling, or at least mobile, con man who, while suit is pending against him, is likely to complete what deals he can and then depart the jurisdiction. Ex parte relief is the only effective means of preserving the status quo until a hearing can be had on a temporary injunction. Second, issuance of a temporary restraining order assures a hearing on the temporary injunction within ten days.<sup>228</sup> The swiftness of this justice tends to promote meaningful settlement negotiations on a basis favorable to the state and to the consumers it represents. Deprived of their most potent tactic—delay—defendants suddenly become anxious to “get straight with the State.”

b. *Penalties.* Civil penalties up to two thousand dollars per violation of the DTPA, not to exceed ten thousand dollars, may be assessed each defendant sued by the Division.<sup>229</sup> This ten thousand dollar ceiling on liability seems anomalous when contrasted with other state statutes providing for civil penalties. The Texas Water Quality Act<sup>230</sup> and the Texas Clean Air Act,<sup>231</sup> for example, both provide for civil penalties of from fifty to one thousand dollars for each day the unlawful pollution continues; no ceiling is placed on liability.<sup>232</sup> Civil penalty judgments under these statutes have ranged as high as two hundred and fifty thousand dollars<sup>233</sup> providing a substantial deterrent against conduct violative of the pollution statutes. Those who abuse consumers should not be subjected to any lesser penalty than those who abuse our air and water resources, especially when one considers that consumer fraud and illegal competition cost the Texas economy at least four hundred and twenty million dollars every year.<sup>234</sup>

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228. TEX. R. CIV. P. 680.

229. TEX. BUS. & COMM. CODE ANN. § 17.47(c) (Supp. 1976-1977).

230. TEX. WATER CODE ANN. § 21.001 to .808 (1972 & Supp. 1976-1977).

231. TEX. REV. CIV. STAT. ANN. art. 4477-5 (1976).

232. TEX. WATER CODE ANN. § 21.553 (1972) (\$10-\$1,000); TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.02(a) (1976) (\$50-\$1,000).

233. *City of El Paso v. American Smelting & Ref. Co.*, Cause No. 70-1701, Dist. Ct. of El Paso County, 41st Judicial Dist. of Texas, May 14, 1975 (agreed judgment for violation of Texas Air Control Board regulations). See also *State v. Jefferson Chem. Co.*, Cause No. 1,043,678, Dist. Ct. of Harris County, 25th Judicial Dist. of Texas, May 14, 1976 (civil penalty of \$200,000 awarded state for violation by defendant of Texas Clean Air Act).

234. CHAMBER OF COMMERCE OF THE UNITED STATES, *A HANDBOOK ON WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS* 6 (1974) estimated that the national cost of consumer fraud, illegal competition, and deceptive practices (excluding price-fixing) totaled 21 billion dollars annually. Texas is presumably bearing even more

c. *“Additional orders or judgments.”* Perhaps the most far-reaching language of the DTPA states that the court, in addition to awarding injunctive relief and penalties, may make such other “orders or judgments as are necessary to compensate identifiable persons for actual damages or restoration of money or property, real or personal, which may have been acquired by means of any act or practice restrained.”<sup>235</sup> The Division is, therefore, expressly authorized to act as *parens patriae* for all persons injured by deceptive trade practices. While the purpose of this section is to provide a means of redress for victims of consumer fraud, it also acts as a strong deterrent to illegal conduct. One might scoff at a civil penalty of ten thousand dollars, but not at a restitution order of one million dollars.<sup>236</sup>

The DTPA distinguishes “actual damages” from “restoration of money or property” both in the public enforcement provision<sup>237</sup> and in the private remedies provision.<sup>238</sup> The distinction is significant because “[d]amages may not include any damages incurred beyond a point two years prior to institution of the action by the consumer protection division.”<sup>239</sup> Thus limitations would not bar a judgment for restitution only, even though the injury occurred more than two years before suit was filed.

d. *Receiverships.* The DTPA expressly authorizes receiverships and sequestration where the defendant fails to comply with a restitution order within three months after it becomes final.<sup>240</sup> The need for a receivership is most acute, however, during the early stages of litigation because the defendant might otherwise dissipate his assets rendering a final judgment virtually uncollectible.<sup>241</sup> It has been the Division’s

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than its pro-rata share of 420 million dollars because its economy is more active and complex than many other states.

235. TEX. BUS. & COMM. CODE ANN. § 17.47(d) (Supp. 1976-1977); see *Bourland v. State*, 528 S.W.2d 350, 358 (Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.), holding that the state’s right to seek restitution under § 17.47(d) is not limited to “consumers” but includes all “persons” injured by a violation of the DTPA. Compare TEX. BUS. & COMM. CODE ANN. § 17.45(3) (Supp. 1976-1977) (“person”), with *id.* § 17.45(4) (“consumer”).

236. *In State v. Wehling*, Cause No. 74-CI-14335, Dist. Ct. of Bexar County, 45th Judicial District of Texas, (Feb. 18, 1977) (judgment for restitution totalling \$927,793.60 to students of vocational schools operated by the defendant).

237. TEX. BUS. & COMM. CODE ANN. § 17.47(d) (Supp. 1976-1977).

238. *Id.* § 17.50(b)(1)-(4).

239. *Id.* § 17.47(d) (emphasis added).

240. *Id.* § 17.47(d).

241. Concern over dissipation of assets was the primary reason for passage of TEX. REV. CIV. STAT. ANN. art. 581-25-1 (Supp. 1976-1977), which expressly authorizes receiverships during the pendency of fraud litigation under the Texas Securities Act. See

experience that the defendant who fails to make restitution generally has few, if any, assets to receive.

Authority to appoint a receiver during the pendency of litigation is implicit in the DTPA's provision for "additional orders or judgments,"<sup>242</sup> since, a receivership very often will be essential "to compensate identifiable persons for actual damages or restoration of money or property."<sup>243</sup> Additional authority is contained in the general receivership statute<sup>244</sup> and in the Miscellaneous Corporations Act.<sup>245</sup>

The general receivership statute<sup>246</sup> provides three possible bases for appointment of a receiver in suits brought by the Division. First, receivership is authorized in an action by a creditor to subject any property or fund to his claim.<sup>247</sup> The Miscellaneous Corporations Act gives the state a statutory lien against a corporation when it violates any Texas law which provides for a penalty.<sup>248</sup> The lien is effective on the date the petition is filed.<sup>249</sup> Thus, with respect to corporations, the state is a creditor and therefore entitled to a receivership to protect its claims.

Second, the general receivership statute authorizes receiverships "where a corporation is insolvent or in imminent danger of insolvency."<sup>250</sup> This provision provides a useful basis for appointment of a receiver in actions under the DTPA because fraudulent corporations are frequently thinly capitalized with any cash flow into the corporation rapidly converted to the personal use of its directors and officers.<sup>251</sup>

Third, receivership is authorized in "all other cases where receivers have heretofore been appointed by the usages of the court of equity."<sup>252</sup> Since equity receivership independent of statute has been granted on the sole ground that the defendant's conduct constituted fraud and

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Bateman & Dawson, *The 1975 Amendments to the Texas Business Corporation Act and the Texas Securities Act*, 6 TEX. TECH. L. REV. 951, 1013 (1975). This concern applies with equal force in actions brought under the Consumer Protection Act.

242. TEX. BUS. & COMM. CODE ANN. § 17.47(d) (Supp. 1976-1977).

243. *Id.*

244. TEX. REV. CIV. STAT. ANN. arts. 2293-2320c (1971).

245. *Id.* arts. 1302-1.01 to -6.26 (1962).

246. *Id.* arts. 2293-2320c (1971).

247. *Id.* art. 2293(1) (1971).

248. *Id.* art. 1302-5.07 (1962).

249. *Id.* art. 1302-5.08 (1962).

250. *Id.* art. 2293(3) (1971). Insolvency is defined as the inability of a corporation to pay its debts as they become due in the ordinary course of business. TEX. BUS. CORP. ACT ANN. at 1.02(16) (1956).

251. *See, e.g.*, Collegiate Recovery & Credit Assistance Programs, Inc. v. State, 525 S.W.2d 900, 901-02 (Tex. Civ. App.—Waco 1975, no writ); Robinson v. Thompson, 466 S.W.2d 626, 628 (Tex. Civ. App.—Eastland 1971, no writ).

252. TEX. REV. CIV. STAT. ANN. art. 2293(4) (1971).



unfair advantage,<sup>253</sup> it is reasonable to assume that receivership would likewise be supported by a showing that money or other property was wrongfully taken through the commission of a deceptive trade practice.

Two other bases for receivership are available where a corporation is a defendant. Article 1302-5.10 provides that in any case where the state is suing a corporation for penalties, a receiver may be appointed "whenever the interest of the State may seem to require such action."<sup>254</sup> Further, the Business Corporation Act also provides for a receivership where the attorney general is seeking involuntary dissolution.<sup>255</sup>

As with temporary restraining orders, the Division may seek receivership *ex parte* where it is convinced that preservation of assets for the protection of consumers and the state so require.<sup>256</sup>

#### D. Violation of Judgments

Where a defendant violates an injunction, the Division can proceed under the general contempt statute<sup>257</sup> for a five hundred dollar fine and incarceration of the defendant.<sup>258</sup> The DTPA itself provides for penalties of ten thousand dollars per violation of a judgment up to a maximum of fifty thousand dollars.<sup>259</sup> If the latter course is followed, the court is directed to "take into consideration the maintenance of procedures reasonably adapted to insure compliance with the injunction"<sup>260</sup> in determining whether a violation of its terms has occurred.<sup>261</sup> The Supreme Court of Texas has held, however, that the state need not show that the defendant "knowingly" violated the injunction.<sup>262</sup> The su-

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253. *Patton v. State*, 62 S.W.2d 381, 384 (Tex. Civ. App.—Texarkana 1933, no writ). *See also* *Crossman v. State*, 65 S.W.2d 380 (Tex. Civ. App.—Texarkana 1933, no writ).

254. TEX. REV. CIV. STAT. ANN. art. 1302-5.10 (1962).

255. TEX. BUS. CORP. ACT ANN. art. 7.06 (Supp. 1976-1977). Involuntary dissolution may be sought for violation of state law. *Trans-State Oil Co. v. State*, 66 S.W.2d 384, 386 (Tex. Civ. App.—Texarkana 1933, no writ); *cf.* *State v. First Divine Ass'n in America*, 248 S.W.2d 291, 293 (Tex. Civ. App.—Fort Worth 1952, writ *ref'd n.r.e.*) (violation must be intentional or completely indifferent to demands of public duty.)

256. *Collegiate Recovery & Credit Assistance Programs, Inc. v. State*, 525 S.W.2d 900, 902 (Tex. Civ. App.—Waco 1975, no writ).

257. TEX. REV. CIV. STAT. ANN. art. 1911a (Supp. 1976-1977).

258. *Id.* art. 1911a, § 2(a).

259. TEX. BUS. & COMM. CODE ANN. § 17.47(e) (Supp. 1976-1977).

260. *Id.*

261. *Id.*

262. *Cf.* *State v. Credit Bureau, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975), holding state need not prove a defendant "knowingly" violated an injunction issued pursuant to the old Deceptive Trade Practices Act, TEX. REV. CIV. STAT. ANN. art. 5069-10.04 (1971) (repealed 1973). The supreme court would most likely reach the same result under the new Consumer Protection Act.

preme court has also held that a defendant is entitled to a jury trial in such proceedings.<sup>263</sup>

Where a defendant is hopelessly recalcitrant, additional fines may be ineffective. A more effective remedy may be a short, but, no doubt, meaningful stay in the local county jail. Such a contempt order might well cure, for example, an obdurate refusal to make restitution. The defendant would "hold the keys to the jailhouse" and, hopefully, would become anxious to use them.<sup>264</sup>

#### E. Settlement Policy

Virtually without exception, the Division is willing to discuss terms for an agreed judgment with actual or prospective defendants. Present Division policy dictates that for an agreed judgment to be accepted, however, it must contain at a minimum: (1) a permanent injunction against further violations; (2) a reasonable civil penalty; and, where appropriate, (3) restitution to persons injured by the defendant's conduct.

The DTPA provides that the Division may accept a written "assurance of voluntary compliance"<sup>265</sup> from any person who is engaging in, has engaged in, or is about to engage in any act or practice proscribed by the DTPA,<sup>266</sup> subject to district court approval.<sup>267</sup> The assurance may be conditioned on the stipulation that restitution be made to any

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263. *Cf.* *State v. Credit Bureau, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975), holding defendant has right to jury trial in proceedings for violation of injunction under the old Deceptive Trade Practices Act, TEX. REV. CIV. STAT. ANN. art. 5069-10.04 (1971) (repealed 1973). *Compare Ex parte Werblud*, 536 S.W.2d 542, 545-47 (Tex. 1976), holding no right to jury trial under the general contempt statute, TEX. REV. CIV. STAT. ANN. art. 1911a, § 2 (Supp. 1976-1977), in case of constructive criminal contempt wherein two separate \$500 fines were imposed.

264. As a defense to imprisonment for failure to make restitution, defendant might argue that such a contempt order runs afoul of the constitutional prohibition against imprisonment for debt. TEX. CONST. art. 1, § 18. It is unclear whether this constitutional prohibition is even applicable to restitution orders entered in an action arising under a statute such as the DTPA.

It does appear, however, that imprisonment for failure to pay civil penalties imposed under the DTPA would not fall within the ambit of the constitutional prohibition against imprisonment for debt. *Cf.* *City of Fort Madison v. Bergthold*, 93 N.W.2d 112 (Iowa 1958); *Treffry v. Taylor*, 408 P.2d 269 (Wash. 1965), *appeal dismissed*, 385 U.S. 10 (1966); *Moore v. Indian Spring Channel Gold Min. Co.*, 174 P. 378 (1918); *State v. International Harvester Co.*, 63 N.W.2d 547 (Minn. 1954), *appeal dismissed*, 348 U.S. 853 (1954); *Mozorosky v. Hulburt*, 211 P. 893 (Ore. 1923).

265. TEX. BUS. & COMM. CODE ANN. § 17.58 (Supp. 1976-1977).

266. *Id.* § 17.58(a).

267. *Id.* § 17.58(a). Venue lies in the county in which the alleged violator resides, does business, or in Travis County. *Id.* § 17.58(a).

persons injured by the offender's conduct.<sup>268</sup> While an assurance does not constitute a technical admission of a prior violation of the DTPA,<sup>269</sup> it does state that defendant will cease from engaging in the proscribed act or practices in the future. Thus, if the terms of the assurance are subsequently violated, it constitutes prima facie evidence of a violation of the DTPA.<sup>270</sup>

The present policy of the Division is to accept assurances only in those cases involving first offenders guilty of minor infractions of the DTPA and only where the Division is reasonably satisfied that the unlawful conduct is unlikely to recur.

#### IV. PRIVATE RIGHTS AND REMEDIES

##### A. Definition of "Consumer"

Only a plaintiff falling within the ambit of the DTPA's definition of "consumer"<sup>271</sup> may bring a treble damage action thereunder. This requirement is met if the plaintiff is an individual, partnership, or corporation who has sought or acquired, by lease or purchase, any tangible chattel, real property, or services for use.<sup>272</sup>

The meaning of "use" has not been settled by the courts. While it can be logically argued that the DTPA is intended to afford a remedy to those who actually "consume" goods or services,<sup>273</sup> it is not entirely clear that the legislature intended this result. In 1975 the legislature amended both definitions of "consumer" and "goods" in such a fashion as to

268. *Id.* § 17.58(b).

269. *Id.* § 17.58(c).

270. *Id.* § 17.58(c).

271. *Id.* § 17.45(4).

272. As pointed out in Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 5 (1976) [hereinafter cited as Bragg], there is an important and unfortunate distinction between the definition of "goods" and that of "services" under the DTPA. A service is not a service unless it is "for other than commercial or business use." TEX. BUS. & COMM. CODE ANN. § 17.45(2) (Supp. 1976-1977). The only restriction on goods is that a "good" must be sought or acquired "for use." *Id.* § 17.45(1). Mr. Bragg states:

The exclusion of commercial services from the coverage of the Act is not consistent with the redefinition of "consumer" to include business entities. Obviously there is no logical difference between a deceptive transaction involving goods and one involving services. Yet, the Act does draw this distinction and, barring subsequent amendments, it would appear that the businessman deceived in the purchase or lease of services [or deceived in the seeking thereof] must still rely solely on common law remedies.

Bragg, *supra*, at 5. In the proposed amendment to the DTPA, governmental entities would be added to the definition of a "consumer" in § 17.45(4). The exclusionary language in § 17.45(2), "for other than commercial or business use," would be deleted.

273. Bragg, *supra* note 271, at 9.

cast doubt on the notion that only end users are afforded private remedies under the DTPA. First, partnerships and corporations were specifically inserted into the definition of "consumer," obviously intending to entitle such entities to the full protections of the DTPA when they are injured by deceptive trade practices, breaches of warranty, unconscionable actions, or violations of article 21.21 of the Insurance Code. Second, the definition of "goods" was amended to include real property. The original language of the amendment provided that "[g]oods means tangible chattels and real property purchased or leased for *final use*." The word "final" was deleted from the amendment following testimony by a representative of the Texas Automobile Dealers Association to the effect that if "use" were restricted to final use, automobile dealers would lose their standing to sue companies or individuals who sell products which are intended to be resold to dealers' customers. The deletion of the word "final" was unanimously adopted by the committee after which the bill was favorably reported to the Senate.<sup>274</sup> Senate Bill 48, thus amended, passed both houses with no further discussion.

In any event, it is clear that any business entity actually using a product in the conduct of its commercial activities—for example, a demonstrator used by an automobile dealer—is a "consumer" for purposes of the DTPA.<sup>275</sup>

#### B. Absence of Privity Requirement

The DTPA does not by its terms require privity between the consumer and the defendant. Indeed, the DTPA does not require the existence of a contractual relationship since it protects one who "*seeks or acquires by purchase or lease any goods or services.*"<sup>276</sup> The legislature could easily have included the requirement of privity in the definition of "consumer" by requiring that the individual, partnership, or corporation seek or acquire the goods or services in question "from the defendant."

274. *Hearings Before the Human Resources Committee of the Senate of the State of Texas on S.B. 48*, at 21-23 (Feb. 3, 1975).

A broad construction of the word "use" would alleviate another issue that has arisen under the DTPA—indemnity. In *Volkswagen of America, Inc. v. Licht*, 544 S.W.2d 442 (Tex. Civ. App.—El Paso 1976, no writ) the court held that an automobile dealer could not seek indemnity from the manufacturer for damages awarded a consumer for breach of an automobile warranty, since the DTPA does not expressly provide for indemnity. If "use" were construed broadly, the dealer in *Licht* would be a "consumer" and thus entitled to maintain his own cause of action against the manufacturer under TEX. BUS. & COMM. CODE ANN. § 17.50(a)(2) (Supp. 1976-1977).

275. Bragg, *supra* note 272, at 9.

276. TEX. BUS. & COMM. CODE ANN. § 17.54(4) (Supp. 1976-1977) (emphasis added).

Furthermore the oftstated rule that privity is required where the damages suffered are purely economic is, at least at the moment, of doubtful validity in this state. The Beaumont Court of Civil Appeals, in *Nobility Homes, Inc. v. Shivers*,<sup>277</sup> specifically rejected the privity requirement in a breach of warranty action arising out of the sale of a mobile home. In that case the dealer with whom the consumer was in privity was no longer in business. The consumer thus brought suit against the manufacturer. In rejecting the manufacturer's defense of lack of privity, the court expressly relied on the need to avoid wasteful litigation, noting that in many cases the manufacturer will ultimately be held accountable for the falsity of his representation but only after an unduly wasteful process of litigation. Thus, if the consumer or ultimate business user sues and recovers for breach of warranty from his immediate seller and if the latter, in turn, sues and recovers against his supplier in recoupment of his damages and costs, eventually, after several actions by those in the chain of custody, the manufacturer might finally be obliged to shoulder the responsibility which should have been his in the first instance. The Beaumont court stated that such wasteful and often inadequate litigation should not be required in this state.

The specific language of the DTPA restates and emphasizes this policy of economy. Section 17.44 states that the DTPA shall be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions and breaches of warranty and to provide efficient and economical procedures to secure such protection."<sup>278</sup> This legislative intent to provide efficient and economical procedures to secure protection against deceptive business practices would be undermined if privity were required in private causes of action under the DTPA.

To illustrate this point, consider the following hypothetical case. As part of the contract for the sale of a home, the seller agrees to have the home inspected for termites. The exterminator with whom the seller contracts inspects the house and represents that he has found no evidence of termites or termite damage. The deal closes, the buyer takes possession, and discovers, to his surprise, that the house is ridden with termites and termite damage. If the seller has left the state, or is judgment proof, the only person against whom the buyer can proceed is

277. 539 S.W.2d 190 (Tex. Civ. App.—Beaumont 1976, writ granted). The supreme court, as of this writing, has heard oral argument but has issued no opinion.

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

the termite inspector. Furthermore, the termite inspector is the "proper" defendant since it was he who actually made the misrepresentation that caused the buyer's damage. Were "privity of contract" required, however, the buyer could not sue the termite inspector under the DTPA since the termite inspection contract was between the inspector and the *seller*, not the *buyer*. Such an unjust and unreasonable result should not be permitted.<sup>279</sup>

### C. Venue

Private consumer actions may be commenced in the county in which the person against whom the suit is brought resides, has his principal place of business, or is doing business.<sup>280</sup> Though this special venue provision would seem to impose on the plaintiff the obligation of demonstrating only the facts supporting his choice of venue, it has been held that the plaintiff must additionally prove a prima facie cause of action.<sup>281</sup>

### D. Four Causes of Action

1. *Deceptive trade practices.* The consumer's first cause of action is for violations of section 17.46. The law of deceptive trade practices has been discussed previously in Part II of this article. That discussion is directly applicable to private consumer actions for deceptive trade practices.

2. *Failure to comply with an express or implied warranty.* The DTPA provides that a "consumer may maintain an action if he has been adversely affected by . . . a failure by any person to comply with an express or implied warranty."<sup>282</sup> Suit may be brought under this provi-

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279. See *Neueroski v. Blair*, 358 A.2d 473 (N.J. Super. Ct. App. Div. 1976). A federal court has upheld the privity requirement in a suit under the DTPA, *Cloer v. General Motors Corp.*, 395 F. Supp. 1070, 1072 (E.D. Tex. 1975). The court offered no analysis of the DTPA as it bears on the privity issue, but simply chain-cited the pre-*Nobility Homes* Texas authorities requiring privity in economic injury cases. Cf. *Russell v. Hartford Cas. Co.*, Docket No. 12,470 (Tex. Civ. App.—Austin, Feb. 2, 1977) (not yet reported) (plaintiffs, in suit against defendant's liability insurance carrier for damages resulting from cancellation of replacement car arrangement, held not to be "consumers").

280. TEX. BUS. & COMM. CODE ANN. § 17.56 (Supp. 1976-1977).

281. *Doyle v. Grady*, 543 S.W.2d 893, 896 (Tex. Civ. App.—Texarkana 1976, no writ). See n.216 *supra*.

282. TEX. BUS. & COMM. CODE ANN. § 17.50(a)(2) (Supp. 1976-1977). The proposed amendment would change this language from a "failure by any person to comply" to "a breach of an express or implied warranty."

sion for breaches of warranties with respect to either goods or services since, by definition, a consumer is one who seeks or acquires either goods or services.<sup>283</sup>

Whether a warranty exists in a given situation must be determined by law outside the DTPA. With respect to goods, reference must be made to article 2 of the Uniform Commercial Code<sup>284</sup> [UCC] and the recently enacted Magnuson-Moss Warranty—Federal Trade Commission Improvements Act.<sup>285</sup> With respect to services, reference must be made to the common law.

As to goods, article 2 of the UCC creates a warranty of title,<sup>286</sup> provides for creation of express warranties,<sup>287</sup> and creates implied warranties of merchantability<sup>288</sup> and fitness for a particular purpose.<sup>289</sup> Section 2.312 provides that in a contract for the sale of goods, the seller warrants he has good and rightful title and that the goods subject to the contract are free from encumbrances.<sup>290</sup> Section 2.313, governing creation of express warranties, provides that goods purchased shall conform to express warranties created by any affirmation of fact or promise,<sup>291</sup> any description of the goods,<sup>292</sup> or any sample or model<sup>293</sup> provided the affirmation description or sample is made part of the basis of the bargain.<sup>294</sup> "Part of the basis of the bargain" essentially means that the buyer is reasonable in thinking seller had included the warranty in the deal finally concluded; actual reliance by buyer on the warranties in making the purchase is not required.<sup>295</sup>

Sections 2.314 and 2.315 of the UCC provide for the creation of two implied warranties, merchantability and fitness for a particular purpose. Section 2.314 states that in the sale of goods by a merchant, there is an implied warranty that the goods shall be merchantable, that is, fit for

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283. *Id.* § 17.45(4). As pointed out in Comment, *Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 435 (1973), the DTPA supplements the Uniform Commercial Code by expressly permitting actions for breach of warranty in non-sales-of-goods transactions.

284. TEX. BUS. & COMM. CODE ANN. §§ 2.101 to .725 (Tex. UCC 1968).

285. 15 U.S.C. §§ 2301-2312 (Supp. V 1975).

286. TEX. BUS. & COMM. CODE ANN. § 2.312 (Tex. UCC 1968).

287. *Id.* § 2.313.

288. *Id.* § 2.314.

289. *Id.* § 2.315.

290. *Id.* § 2.312(a)(1), (2).

291. *Id.* § 2.313(a)(1).

292. *Id.* § 2.313(a)(2).

293. *Id.* § 2.313(a)(3).

294. *Id.* § 2.313(a)(1)-(3).

295. Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEXAS L. REV. 60, 63-64 (1974).

the ordinary purposes for which the goods are used.<sup>296</sup> Section 2.315 creates an implied warranty of fitness for a particular purpose where seller has "reason to know any particular purpose for which the goods are required and that buyer is relying on the seller's skill or judgment to select or furnish suitable goods."<sup>297</sup> In contrast to the implied warranty of merchantability, the implied warranty of fitness arises even where seller is not a merchant.<sup>298</sup>

The Consumer Protection Act provides that "[a]ny waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void."<sup>299</sup> The first issue raised by this "no waiver" provision is its effect on section 2.316 of the UCC, which expressly authorizes disclaimers by sellers of the implied warranties.<sup>300</sup> One commentator has correctly suggested that "[i]f Section 2.316 is complied with, no warranty ever arises and therefore, there is no remedy provided by the Act which the consumer could waive."<sup>301</sup> The issue of how to reconcile the "no waiver" provision of the DTPA with the availability of disclaimers under the UCC has now become largely academic, however, since the Magnuson-Moss Warranty Act effectively repeals section 2.316 of the UCC where consumer goods are involved.<sup>302</sup> As stated by one commentator:

[S]ection 108 [of the Magnuson-Moss Warranty Act] changes existing state law and provides that no supplier [of consumer goods] may disclaim or modify an implied warranty if he makes a written warranty or gives a service contract with respect to products sold. It does permit a written warranty to be limited to a reasonable duration "if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty." This provision is clearly in conflict with section 2-316 of the *Uniform Commercial Code* and will prevail over it and any other contradictory state laws which do not afford the consumer greater rights. Thus, the provisions

296. TEX. BUS. & COMM. CODE ANN. § 2.314(a), (b)(3) (Tex. UCC 1968). Other definitions of merchantability are contained in § 2.314(b).

297. *Id.* § 2.315.

298. Compare *id.* § 2.315, with *id.* § 2.314(a). There is no requirement that seller be a merchant for express warranties to arise. *Id.* § 2.313.

299. *Id.* § 17.42 (Supp. 1976-1977).

300. *Id.* § 2.316(c)(2) (Tex. UCC 1968).

301. Note, 26 BAYLOR L. REV. 440, 448 (1974).

302. 15 U.S.C. § 2308 (Supp. V 1975). Note that the Magnuson-Moss Warranty Act applies only to written warranties pertaining to consumer products. See definitions contained in 15 U.S.C.A. § 2301(1), (3), (6) (Supp. V 1975). 15 U.S.C. § 2308 (Supp. V 1975) has no application to implied warranties arising in the context of services as opposed to goods.



of the *Uniform Commercial Code* dealing with disclaimer of warranties are clearly modified insofar as they apply to consumer warranties. For most states, this is a substantial change in the law . . . .<sup>303</sup>

While disclaimer of implied warranties is no longer available to suppliers of consumer goods who make express written warranties, the question still remains as to whether section 2.719 of the UCC,<sup>304</sup> which permits limitation or modification of remedies, conflicts with the Consumer Protection Act's "no waiver" provision. It should be emphasized that section 2.719, unlike section 2.316, provides for limitation or modification of *remedies* for breach of warranty that has not been disclaimed.

Section 2.719 provides, in pertinent part:

(1) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and (2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.<sup>305</sup>

These provisions seem irreconcilable with the "no waiver" provision in many consumer transactions.<sup>306</sup> Thus, any attempt by seller to limit the consumer's recovery to actual damages would clearly be void since the DTPA entitles the consumer to seek treble damages.<sup>307</sup> Further, any attempt to limit the consumer's remedy for breach of warranty to repair and replacement, permissible under section 2.719 of the UCC,<sup>308</sup> would be void under the "no waiver" provision since

303. Strasser, *Magnuson-Moss Warranty Act: An Overview and Comparison with UCC Coverage, Disclaimer, and Remedies in Consumer Warranties*, 27 MERCER L. REV. 1111, 1119 (1976). See also Shaw, *Magnuson-Moss Warranty—Federal Trade Commission Improvement Act*, 17 S. TEX. L.J. 229, 234 (1976); Comment, *Consumer Product Warranties—The FTC Steps In*, 9 JOHN MARSHALL J. OF PRAC. & PROC. 887, 889 (1976). See generally Comment, *Breach of Warranty and Treble Damages Under the Texas Deceptive Trade Practices and Consumer Protection Act*, 28 BAYLOR L. REV. 395, 395-97 (1976).

304. TEX. BUS. & COMM. CODE ANN. § 2.719 (Tex. UCC 1968).

305. *Id.* 2.719(a)(1), (2).

306. Compare Anderson, *The Uniform Commercial Code and the Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 725, 729 (1976); Comment, *Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 435-36 (1973), with Note, 26 BAYLOR L. REV. 440 (1974), which reconciles § 2.313 of the UCC with § 17.42 of the DTPA but fails to address the effect of § 17.42 on § 2.719 of the UCC.

307. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976-1977).

308. *Id.* § 2.719(a)(1) (Tex. UCC 1968).

such a limitation of remedies would impair the injured consumer's statutory right to seek any or all of the remedies listed in section 17.50(b) of the DTPA.<sup>309</sup>

In addition to permitting private consumer actions for failure to comply with warranties arising in connection with goods, subsection 17.50(a)(2) permits private actions for failure to comply with warranties arising in connection with services sought or acquired by consumers. Motor vehicle repair work provides a good example of a service where warranties arise.

The decided cases firmly establish an implied warranty which attaches to motor vehicle repair work. If a repairman maintains a shop, holds himself out as a mechanic, and accepts a contract for repair work, he represents that he and his mechanics possess the reasonable skill and ability to do the necessary work. The implicit promise is that the repairman will procure the available and needed parts, replace the old parts, and repair the vehicle in a skillful and workmanlike manner.<sup>310</sup> The only limitation on this warranty is that "where requested repairs are made to an automobile, no implied warranty arises that the entire automobile is suitable and fit to perform the ordinary purposes which new cars are expected to perform."<sup>311</sup>

A consumer with a warranty problem is not necessarily limited to the cause of action for failure to comply with a warranty under subsection 17.50(a)(2). Even if a traditional "breach of warranty" cannot be found, the consumer might still be able to prove a violation of subsection 17.46(b)(19) by showing that the defendant misrepresented the "rights or remedies" under a warranty.

3. "*Unconscionable action or course of action.*" Although the phrase "unconscionable action or course of action" is not defined in the DTPA,<sup>312</sup> the concept it embodies is by no means novel. Throughout

309. For a discussion of implied warranties arising in connection with the purchase of new homes, see Note, 6 Hous. L. Rev. 176 (1968). Breach of the implied warranties that a new home is constructed in a good and workmanlike manner and is suitable for human habitation, *Humber v. Morton*, 426 S.W.2d 544, 557 (Tex. 1968), are compensable under the DTPA since the definition of "goods" was amended in 1975 to include real property. TEX. BUS. & COMM. CODE ANN. § 17.45(1) (Supp. 1976-1977).

310. *Manzer v. Barnes*, 237 S.W.2d 686, 688 (Tex. Civ. App.—Amarillo 1950, no writ); *accord*, *Winkler v. Sar Mfg. Co.*, 508 S.W.2d 107, 109 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). See generally Annot., 92 A.L.R.2d 1408 (1963).

311. *Sam White Oldsmobile Co. v. Jones Apothecary, Inc.*, 337 S.W.2d 834, 836 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

312. The proposed amendment will supply a definition. See text accompanying note 393 *infra*.

history courts of law and equity have refused to enforce contract terms they believed to be oppressive or manifestly unfair.<sup>313</sup> The opinions rarely expressed the real reason for the result reached because of judicial reverence for "freedom of contract."<sup>314</sup> Thus, contract terms were "surreptitiously invalidated" through artful use of the doctrines of fraud, lack of mutuality, failure of consideration, and by construction of ambiguous contract words and phrases.<sup>315</sup>

With the adoption in Texas of the UCC,<sup>316</sup> the doctrine of "unconscionability" was formally recognized as it applied to the sale of goods. Section 2.302 of the UCC<sup>317</sup> authorizes the court, whenever it finds a contract or a contract clause "to have been unconscionable at the time it was made,"<sup>318</sup> to refuse to enforce the contract, to enforce the unobjectionable remainder of the contract, or to limit the application of the unconscionable clause so as to avoid an unconscionable result.<sup>319</sup> Where unconscionability is raised, section 2.302 permits the introduction of evidence as to the commercial setting, purpose, and effect of the contract or clause to assist the court in resolving the issue.<sup>320</sup> Thus, unconscionability under the UCC is a question for the court and, if found, provides a contract defense.<sup>321</sup>

Unconscionability under the DTPA differs from the UCC in several material respects.<sup>322</sup> First, unconscionability under the DTPA is not a

313. Perhaps the earliest reference to unconscionability was in *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82 (Ch. 1751), in which Lord Hardwicke viewed the unconscionable bargain as giving rise to the presumption of fraud:

[Fraud] may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequal and unconscientious bargains . . . .

*Id.* at 100. For a discussion of the development of the doctrine of unconscionability, see Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969) [hereinafter cited as Spanogle]; Terry & Fauvre, *The Unconscionability Offense*, 4 GA. L. REV. 469 (1970) [hereinafter cited as Terry & Fauvre].

314. Spanogle, *supra* note 313, at 934 & nn.8-10; Terry & Fauvre, *supra* note 313, at 477-79 & nn.32,33.

315. Spanogle, *supra* note 313, at 934 & nn.8-10; Terry & Fauvre, *supra* note 313, at 477-79 & n.31.

316. TEX. BUS. & COMM. CODE ANN. §§ 1.101 to .108 (Tex. UCC 1968 & Supp. 1976-1977).

317. *Id.* § 2.302 (1968).

318. *Id.* § 2.302(a) (1968).

319. *Id.* § 2.302(a) (1968).

320. *Id.* § 2.302(b) (1968).

321. *But see* *Bal-Fel, Inc. v. Boyd*, 503 S.W.2d 673, 678 (Tex. Civ. App.—Austin 1973, no writ), where § 2.301 of the UCC was employed as an alternative ground to fraud in a suit to recover exorbitant sums paid for dancing lessons.

322. See Comment, *Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 436-38 (1973).

defense; it is an affirmative cause of action. The consumer need not wait until he is sued to raise unconscionability, but may take the initiative himself by seeking treble damages. The second, third, and fourth differences arise from the DTPA's definition of "consumer" as one "who seeks or acquires by purchase or lease, any goods or services."<sup>323</sup> Thus, an "unconscionable action or course of action" may occur even where there is no contract, where a lease rather than sale is contemplated, or where only services are involved. None of these situations are covered by the UCC since it applies only to the contractual sale of goods. The final difference has yet to be established by an appellate court—whether unconscionability under the DTPA should be decided by the court, as under the UCC, or should be submitted to the jury with an appropriate instruction. At least one Texas trial court has chosen the latter path.<sup>324</sup>

It is important to keep these differences in mind lest too much reliance be placed on cases decided under, or prior to the enactment of the UCC, in determining whether the consumer has a cause of action under subsection 17.50(b)(3) of the DTPA. To be sure, these authorities<sup>325</sup> are helpful, but they cannot, and should not, be held to limit

323. TEX. BUS. & COMM. CODE ANN. § 17.45(4) (Supp. 1976-1977) (emphasis added).

324. In *Drake v. Steakley Bros. Chevrolet, Inc.*, Civ. No. 75-1716-3, Dist. Ct. of McLennan County, 74th Judicial Dist. of Texas, the trial court submitted unconscionability to the jury with the following instruction:

You are instructed that the term unconscionable action or course of action means any act or practice which has the capacity or tendency to:

- (1) take advantage of the average or ordinary person's lack of knowledge, ability, experience or capacity to a grossly unfair degree, or
- (2) results in a gross disparity or difference between the value received by the plaintiff and the price paid.

You are further instructed that this act or practice may arise in connection with the sale or lease of any goods or services, whether the act or practice occurs prior to, at the time of, or subsequent to the actual transaction between the parties.

The instruction is based on the definition given "unconscionable trade practice" in N.M. STAT. ANN. § 49-15-2(D) (Supp. 1975) which is reflected in the language of the proposed amendment to the DTPA.

325. For analysis of the doctrine of unconscionability, see Harrington, *Unconscionability under the Uniform Commercial Code*, 10 S. TEX. L. REV. 203 (1968); Hicks, *Unconscionable Clauses in Real Property Leases*, 24 BAYLOR L. REV. 498 (1972); Spanogle, *supra* note 313, at 934; Terry & Fauvre, *supra* note 313, at 477-79; Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty under the U.C.C.*, 53 TEXAS L. REV. 60 (1974). See also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (contract term retaining title in seller to all items purchased by consumer until all installment payments made); *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964); *Collins v. Uniroyal, Inc.*, 315 A.2d 16 (N.J. 1974) (contract term disallowing recovery of consequential damages for breach of warranty); *Paragon Homes, Inc. v. Crace*, 4 UCC REP. SERV. 10 (N.Y. Sup. Ct. 1967) (contract term providing exclusive jurisdiction for contract enforcement in distant forum); *Paragon Homes, Inc. v. Langlois*, 4 UCC REP. SERV. 16 (N.Y. Sup. Ct. 1967);

the scope of unconscionability under the DTPA.<sup>326</sup>

4. *Article 21.21 of the Insurance Code.* A consumer is entitled to sue under the DTPA where he has been adversely affected by "the use or employment by any person of an act or practice in violation of article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under article 21.21, Texas Insurance Code, as amended."<sup>327</sup> Section 3 of article 21.21 of the Insurance Code provides: "No person shall engage in this state in any trade practice which is defined in this Act as, or determined pursuant to this Act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."<sup>328</sup> Section 4 of article 21.21<sup>329</sup> defines those trade practices which constitute unfair methods of competition or unfair and deceptive acts or practices in the business of insurance.

There is only one decision construing article 21.21 in the context of a private action under the Consumer Protection Act.<sup>330</sup> Future consumer actions, however, will probably be based on violations of subsections 4(1) and 4(2) of article 21.21, which regulate false advertising in the insurance industry.<sup>331</sup> Subsection 4(1)<sup>332</sup> prohibits the follow-

*Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on issue of damages*, 281 N.Y.S.2d 964 (Sup. Ct. 1967) (gross disparity between value of product and price paid); *Wade v. Austin*, 524 S.W.2d 79 (Tex. Civ. App.—Texarkana 1975, no writ); *Bal-Fel, Inc. v. Boyd*, 503 S.W.2d 673 (Tex. Civ. App.—Austin 1973, no writ) (suit to recover exorbitant sums paid for dancing lessons); *Blount v. Westinghouse Credit Corp.*, 432 S.W.2d 549 (Tex. Civ. App.—Dallas 1968, no writ).

326. The notions of fair play that comprise the doctrine of unconscionability are derived from many sources, not the least important of which is other statutes. See Spanogle, *supra* note 313, at 969. Thus, the Texas Debt Collection Practices Act, TEX. REV. CIV. STAT. ANN. art. 5069-11.04 (Supp. 1976-1977), defines certain prohibited collection practices as unfair or unconscionable. As statutes alter the ground rules for commercial conduct they will directly affect what is, or is not, unconscionable.

327. TEX. REV. CIV. STAT. ANN. § 17.50(a)(4) (Supp. 1976-1977).

328. TEX. INS. CODE ANN. art. 21.21, § 3 (1963).

329. *Id.* art. 21.21, § 4.

330. *Russell v. Hartford Cas. Ins. Co.*, Docket No. 12,470 (Tex. Civ. App.—Austin, Feb. 2, 1977) (not yet reported). Brief mention of article 21.21 of the Insurance Code was made in *Doyle v. Grady*, 543 S.W.2d 893, 896 (Tex. Civ. App.—Texarkana 1976, no writ), wherein the court stated, in the context of a hearing on a plea of privilege, that plaintiff failed to plead and prove a violation of article 21.21. For a common law action for fraud and misrepresentations in insurance sales literature, see *International Sec. Life Ins. Co. v. Langston*, 457 S.W.2d 110 (Tex. Civ. App.—Amarillo 1970, no writ).

331. Compare TEX. INS. CODE ANN. art. 21.21, § 4(1) (1963), which prohibits, in part, making any "statement misrepresenting the terms of any policy issued or to be issued," with TEX. BUS. & COMM. CODE ANN. § 17.46(b)(12) (Supp. 1976-1977), which states that "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law" is a deceptive trade practice.

332. TEX. INS. CODE ANN. art. 21.21, § 4(1) (1963).

ing forms of misrepresentation and false advertising of policy contracts: misrepresentations with respect to the terms or benefits of any policy; misrepresentations with respect to the dividends or share of the surplus to be received on a policy or on dividends or share of the surplus previously paid on similar policies; misrepresentations as to the financial condition of any insurer or as to the legal reserve system upon which any life insurer operates; using any name or title for a policy which misrepresents its true nature; and misrepresentations made to any policyholder insured by any company to induce him to lapse, forfeit, or surrender his insurance.

Subsection 4(2) of article 21.21<sup>333</sup> contains a broad, catch-all prohibition against untrue, deceptive, or misleading information and advertising with respect to the business of insurance or with respect to any person in the conduct of his insurance business. Thus, a form of misrepresentation or false advertising which does not fall within the ambit of subsection 4(1) might still constitute a violation of article 21.21 under the more expansive rubric of subsection 4(2).

In addition to prohibiting the dissemination of false information, misrepresentation, and false advertising, section 4 declares unlawful the following acts or practices: making any statement which is false, maliciously critical of, or derogatory to the financial condition of any insurer and which is designed to injure any person engaged in the business of insurance;<sup>334</sup> making or filing any false financial statement with intent to deceive officials or the public;<sup>335</sup> making any false entry in any book, report, or statement with intent to deceive public officials, examiners, or agents, or willfully omitting to make a true entry of any material fact in any book, report, or statement of the insurer;<sup>336</sup> issuing or delivering shares, benefit certificates, or other contracts promising returns and profits as an inducement to purchase insurance;<sup>337</sup> unfair discrimination between policyholders of the insurer;<sup>338</sup> re-

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333. *Id.* art. 21.21, § 4(2).

334. *Id.* art. 21.21, § 4(3).

335. *Id.* art. 21.21, § 4(5)(a).

336. *Id.* art. 21.21, § 4(5)(b).

337. *Id.* art. 21.21, § 4(6).

338. *Id.* art. 21.21, § 4(7). For cases dealing with the question of unfair discrimination, see *Order of Ry. Conductors of America v. Quigley*, 111 S.W.2d 698, 701 (Tex. 1938) (discrimination found); *American Nat'l Ins. Co. v. Tabor*, 230 S.W. 397, 400 (Tex. 1921) (discrimination found but contract enforceable by beneficiary since he was not in *pari delicto* with insurer); *Southland Life Ins. Co. v. Hopkins*, 224 S.W. 989 (Tex. Comm'n App. 1922, *judgment adopted*); *Reeves v. New York Life Ins. Co.*, 421 S.W.2d 686, 688 (Tex. Civ. App.—Dallas 1967, *writ ref'd n.r.e.*) (no discrimination found);

bates;<sup>339</sup> and “[e]ntering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.”<sup>340</sup> The prohibition against boycotts, coercion, or intimidation is particularly significant since it permits a treble damage cause of action under the Consumer Protection Act for traditional antitrust violations.<sup>341</sup>

In addition to providing a cause of action under the Consumer Protection Act for violations of article 21.21, the legislature also provided in article 21.21 itself for a private cause of action for violations of section 4, rules or regulations of the State Board of Insurance issued under article 21.21, or any practice prohibited by section 17.46 of the Consumer Protection Act.<sup>342</sup> The result of providing for a private cause of action under article 21.21 for violations of section 17.46 of the Consumer Protection Act is that the entire “laundry list” contained in section 17.46(b) as well as the section 17.46(a) “catch-all” prohibition are now incorporated into article 21.21.

The major difference between these two private causes of action is that in section 16 of article 21.21 the legislature did not limit the class of plaintiffs who can sue to “consumers.” Rather, section 16 of article 21.21 allows an action by “any *person* who has been injured by another

Great Southern Life Ins. Co. v. Petty, 151 S.W.2d 346, 350-51 (Tex. Civ. App.—Beaumont 1941), *rev'd on other grounds*, 162 S.W.2d 652, 654 (Tex. 1942) (statute prohibiting discrimination will be strictly enforced); Gause v. Security Life Ins. Co. of America, 207 S.W. 346, (Tex. Civ. App.—Fort Worth 1918, no writ) (discrimination found); Morris v. Fort Worth Ins. Co., 200 S.W. 1114, 1115 (Tex. Civ. App.—Texasarkana 1918, no writ) (discrimination found).

339. TEX. INS. CODE ANN. art. 21.21, § 4(8) (1963). For cases discussing rebates, see Ward v. Board of Ins. Comm'rs, 281 S.W.2d 465, 469 (Tex. Civ. App.—Galveston 1955, no writ) (insurance agent who gave certain customers money in return for their turning other customers his way was not guilty of rebating); Wood v. J.E. Earnest & Co., 129 S.W.2d 833, 836 (Tex. Civ. App.—Dallas 1939), *rev'd*, 152 S.W.2d 325, 327 (Tex. 1941) (question of whether rebates given is for jury); Federal Life Ins. Co. v. Hoskins, 185 S.W. 607, 609-10 (Tex. Civ. App.—Dallas 1916, no writ).

340. TEX. INS. CODE ANN. art. 21.21 § 4(4) (1963).

341. In Russell v. Hartford Cas. Ins. Co., Docket No. 12, 470 (Tex. Civ. App.—Austin, Feb. 2, 1977) (not yet reported), the court held: “The purpose of subsection 4 [of § 4 of Article 21.21] is to prevent monopoly or unreasonable restraint in the business of supplying insurance. It is not a basis for a suit by a claimant upset by the handling of his claim by the liability carrier for the tortfeasor.” *Id.* at —. In that case, appellants unsuccessfully argued that the insurer violated TEX. INS. CODE ANN. art. 21.21, § 4 (1963), in attempting “to coerce and intimidate” them by cancelling a rent-car arrangement entered into following the auto collision which formed the basis for the suit. — S.W.2d at —.

342. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Supp. 1976-1977).

er's engaging in any of the practices declared [unlawful]."<sup>343</sup> "Person" is broadly defined as "any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and life insurance counselors."<sup>344</sup>

Thus, a private cause of action has been provided not only for one who "consumes" the service or product of insurance, but also for any competitor or shareholder of an insurance company which is engaging in unfair methods of competition or deceptive acts or practices.

Private causes of action under both article 21.21 and the Consumer Protection Act may be maintained for violations of rules or regulations issued under article 21.21 by the State Board of Insurance as well as for violations of article 21.21 itself.<sup>345</sup> The State Board of Insurance, in 1971, issued rules and regulations concerning insurance trade practices, advertising, and solicitation.<sup>346</sup> The most significant section of these rules and regulations provides:

No person shall engage in this State in any trade practice that is a *misrepresentation of an insurance policy*, that is an unfair method of competition or that is an unfair or deceptive act or practice as defined by the provisions of the Insurance Code of Texas or as defined by these and other Rules and Regulations of the State Board of Insurance authorized by the Code.<sup>347</sup>

343. *Id.* art. 21.21 § 16(9). Compare *id.* art. 21.21, § 16(a), with TEX. BUS. & COMM. CODE ANN. § 17.50(9) (Supp. 1976-1977).

344. TEX. INS. CODE ANN. art. 21.21, § 2(a) (1963).

345. TEX. BUS. & COMM. CODE ANN. § 17.50(a)(4) (Supp. 1976-1977); TEX. INS. CODE ANN. art. 21.21, § 16(a) (Pamp. Supp. 1975-1976).

346. Texas State Board of Insurance, Regulation In Respect of Insurance Trade Practices, Advertising and Solicitations, Docket No. 18663 (Dec. 3, 1971). Copies are available from the State Board of Insurance, Austin, Texas. Note that § 1 makes these rules and regulations applicable to "insurers and insurance agents and other persons in their conduct of the business of insurance or in connection therewith, *whether done directly or indirectly and irrespective of whether the person is active as insurer, principal, agent, employer, or employee, or in other capacity or connection with such insurer.*" *Id.* § 1 (emphasis added).

The State Board of Insurance has issued additional rules and regulations applying article 21.21 to specific problems in the insurance industry. See Regulation in Respect of Replacement of Life Insurance, Docket No. 27700 (Sept. 13, 1974), as amended by Board Order No. 27700 styled Regulation in Respect of Replacement of Life Insurance, Docket No. 29908 (Nov. 7, 1975), and Amendments to Board Order No. 27700 styled Regulation in Respect of Replacement of Life Insurance, Docket No. 30169 (Dec. 31, 1975); Regulation in Respect of Life Insurance Surrender Value Comparison Index, Docket No. 27283 (June 28, 1974); Rules Governing Advertisements of Accident and Health Insurance, Docket No. 16025 (March 10, 1971). See also Rules for Minimum Standards and Benefits and Readability for Accident and Health Insurance Policies, Docket No. 31704 (Dec. 16, 1976).

347. Texas State Board of Insurance, Regulation in Respect of Insurance Trade Practices, Advertising and Solicitations, Docket No. 18663, § 4 (Dec. 3, 1971).



The term "misrepresentation" is expressly defined as follows:

**Sec. 5. MISREPRESENTATION DEFINED. STANDARDS FOR DETERMINING MISREPRESENTATION.** The term misrepresentation, or the prohibited conduct, act or practice that constitutes misrepresentation by a person subject to the provisions of this regulation, is defined as any one of the following acts or omissions:

- (a) any untrue statement of a material fact; or
- (b) any omission to state a material fact necessary to make the statements made (considered in the light of the circumstances under which they are made) not misleading; or
- (c) the making of any statement in such manner or order as to mislead a reasonably prudent person to a false conclusion of a material fact; or
- (d) any material misstatement of law; or
- (e) any failure to disclose any matter required by law to be disclosed, including failure to make disclosure in accordance with the provisions of these and other applicable regulations of the State Board of Insurance.<sup>348</sup>

The Insurance Board regulations also directed the Commissioner of Insurance to issue interpretations and guidelines to aid in the administration and enforcement of the board rules.<sup>349</sup> The Commissioner of Insurance, by official order, issued such guidelines in 1971.<sup>350</sup> It is unclear whether violation of the provisions of these guides constitutes a violation of "rules and regulations" of the State Board of Insurance. If the Commissioner's Order containing these guides carries the force of a Board rule or regulation, then a private cause of action arises under the DTPA and under article 21.21 where any act or practice violates the guides. At a minimum, the guides are strongly persuasive in determining what acts or practices constitute unfair and deceptive trade practices or unfair methods of competition.<sup>351</sup>

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348. *Id.* § 5. This rule effectively requires a finding that the misrepresentation complained of be material. In actions brought under the Consumer Protection Act, there is no materiality requirement. See notes 46 and 48 *supra*.

349. Texas State Board of Insurance, Regulation in Respect of Insurance Trade Practices, Advertising and Solicitations, Docket No. 18663, § 7 (Dec. 3, 1971).

350. Texas State Board of Insurance, Commissioner's Order in Respect of the Regulation of Insurance Trade Practices, Advertising and Solicitation, Docket No. 35848 (Dec. 21, 1971). Copies are available from the State Board of Insurance, Austin, Texas.

351. *Cf.* TEX. BUS. & COMM. CODE ANN. § 17.46(c) (Supp. 1976-1977), which directs the courts to look to FTC and federal court interpretations of § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) (1970), in construing § 17.46(a) of the Consumer Protection Act.

The guides require that every insurer maintain a complete file for inspection by the Insurance Board containing every written advertisement prepared in the last three years with a notation attached to each indicating the manner and extent of distribution and the form number of any policy advertised.<sup>352</sup> The guides further provide that every insurer required to file an annual statement must also file with the board a certificate by an officer of the insurer stating "that to the best of his knowledge, information and belief the advertisements which were disseminated by the insurer during the preceding Statement year complied or were made to comply in all respects with the provisions of these guides."<sup>353</sup>

The guides discuss in detail a large number of trade practices which result or could result in perpetration of consumer fraud. They contain standards and prohibitions regarding, among others, unlawful forms of inducement;<sup>354</sup> combinations tending to restrict trade;<sup>355</sup> testimonials, appraisals, or analyses used by insurers in advertisements;<sup>356</sup> references to dividends in connection with solicitation of insurance;<sup>357</sup> rebates;<sup>358</sup> false disparagement of competitors;<sup>359</sup> descriptions of premiums in advertisements;<sup>360</sup> advertising of benefits and losses covered by a policy;<sup>361</sup> disclosure in advertising of policy provisions relating to renewability, cancellation, or termination;<sup>362</sup> disclosure of all relevant facts in advertisements with respect to statistics, services provided by the insurer, and identity of the insurer and the policy;<sup>363</sup> unfair or incomplete policy or benefit comparisons in advertisements;<sup>364</sup> and advertisements containing initial or special offers.<sup>365</sup>

Guide 2, which governs advertisements in general, is particularly noteworthy. It provides, in pertinent part:

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352. Texas State Board of Insurance, Commissioner's Order in Respect of the Regulation of Insurance Trade Practices, Advertising and Solicitation, Docket No. 35848, Guide 15A (Dec. 21, 1971).

353. *Id.* Guide 15B.

354. *Id.* Guide 3.

355. *Id.* Guide 4.

356. *Id.* Guide 5.

357. *Id.* Guide 6.

358. *Id.* Guide 7.

359. *Id.* Guide 8.

360. *Id.* Guide 9.

361. *Id.* Guide 10.

362. *Id.* Guide 11.

363. *Id.* Guide 12.

364. *Id.* Guide 13.

365. *Id.* Guide 14.

No advertisement shall be used by an insurer which because of words, phrases, statements or illustrations therein or information omitted therefrom *has the capacity and tendency to mislead or deceive purchasers or prospective purchasers*, irrespective of whether a policy advertised is made available to an insured prior to the consummation of the sale or an offer is made of a premium refund if a purchaser is not satisfied. Words or phrases which are misleading or deceptive because the meaning thereof is not clear, or is clear only to persons familiar with insurance terminology, shall not be used. (This guide shall not inhibit use of trade or technical terms in advertisements directed exclusively at commercial enterprises.)<sup>366</sup>

This consumer-oriented provision is far-reaching in its recognition and acceptance of Federal Trade Commission decisions holding that an act or practice is deceptive if it has the "capacity" or "tendency" to deceive.<sup>367</sup>

The dearth of cases construing and applying article 21.21 and the Insurance Board regulations and guidelines issued thereunder is surprising. One possible explanation is that no insurers have perpetrated, or are perpetrating, fraud on Texas citizens. Another possible explanation, which appears far more likely, is that few attorneys and even fewer members of the insurance buying public are aware that an effective means of redress is available against deceptive trade practices and unfair competition in the business of insurance. Given the fact that not only consumers but all injured parties may maintain an action under article 21.21,<sup>368</sup> and given the availability of treble damage awards for violations of article 21.21 in actions brought under either the Consumer Protection Act or under article 21.21,<sup>369</sup> it appears likely that violations of article 21.21 and the rules and regulations issued thereunder will result in considerable litigation in the future.

#### E. Consumer Remedies

Subsection 17.50(b)(1) of the DTPA entitles an "adversely affected"<sup>370</sup> consumer to three times the amount of his "actual damages."<sup>371</sup>

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366. *Id.* Guide 2 (emphasis added).

367. See cases cited note 43 *supra*.

368. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Pamp. Supp. 1975-1976).

369. *Id.* art. 21.21, § 16(b)(1); TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976-1977).

370. TEX. BUS. & COMM. CODE ANN. § 17.50(a) (Supp. 1976-1977).

371. *Id.* § 17.50(b) also provides for injunctive relief, restitution, revocation of licenses, and the appointment of a receiver:

In a suit filed under this section, each consumer who prevails may obtain:

The former chief of the Consumer Protection Division has stated that the phrase "adversely affected" was "expressly used in order to include any sort of harm to consumers, be it economic, physical, or mental."<sup>372</sup> Indeed, damages for mental anguish have been specifically allowed in a private consumer action under the DTPA,<sup>373</sup> and there is no reason—at least none arising from the language of the DTPA itself—to expect that damages for personal or physical injuries will not also be allowed.

The most important issue, one that is currently before the Texas Supreme Court<sup>374</sup> and the Austin Court of Civil Appeals,<sup>375</sup> is whether treble damages are mandatory or permissive. It is the position of the

- (1) three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended;
- (2) an order enjoining such acts or failure to act;
- (3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and
- (4) any other relief which the court deems proper, including the appointment of a receiver or the revocation of a license or certificate authorizing a person to engage in business in this state if the judgment has not been satisfied within three months of the date of the final judgment.

If the court finds that a consumer's action under § 17.50 was "groundless and brought in bad faith or for the purpose of harassment, the court may award to the defendant reasonable attorneys' fees . . . and court costs." *Id.* § 17.50(c). See *Bray v. Curtis*, 544 S.W.2d 816, 820 (Tex. Civ. App.—Corpus Christi 1976, no writ), where the harassment-bad faith issue was erroneously submitted to the jury.

372. Longley & Levatino, *Consumerism Comes to Texas*, 8 TEX. TRIAL LAW. F. 23, 24 (1973). The authors suggest that in the initial interview with the client the lawyer obtain the following information on damages:

- (a) Loss of money from the transaction;
- (b) Time off from work;
- (c) Medical payments, if any;
- (d) Past and future pain and suffering;
- (e) Past and future mental anguish;
- (f) Loss of physical capacity;
- (g) Property damage.

*Id.* at 24. To this list one should add all consequential or incidental damages resulting from the defendant's wrongful conduct.

373. *Littleton v. Woods*, 538 S.W.2d 800, 801-02 (Tex. Civ. App.—Texarkana 1976, writ granted). The case is currently before the supreme court to determine whether proximate cause—foreseeability and cause in fact—must be submitted to the jury in order for plaintiff to be awarded damages for mental anguish. The court of civil appeals held that an issue asking what sum of money would reasonably compensate the plaintiff for past mental anguish suffered "as a result of the occurrence in question" did not properly submit the issue of proximate cause. *Id.* at 802; compare *Ledisco Financial Servs., Inc. v. Viracola*, 533 S.W.2d 951, 956-57 (Tex. Civ. App.—Texarkana 1976, no writ), a debt collection practice suit, holding that a jury issue inquiring whether the plaintiff sustained any damage as a result of the defendant's conduct properly submitted proximate cause.

374. *Woods v. Littleton*, No. B 6,270 (Tex., writ filed Nov. 26, 1976).

375. *Bowman v. Woodmansee*, No. B 12, 510 (Tex. Civ. App.—Austin, stay granted). The court has stayed disposition of the case pending resolution of the *Woods* case, *supra*, note 373.

Attorney General's Office that they are mandatory.<sup>376</sup> Section 17.50(b) provides that a successful consumer "may obtain" any or all of the remedies set forth in that section.<sup>377</sup> The "may" does not vest the trial court with discretion to deny treble damages, but rather authorizes the consumer to seek the remedies listed.<sup>378</sup> Second, unlike the class action<sup>379</sup> and public enforcement<sup>380</sup> sections of the DTPA, which authorize recovery of only "actual damages," the individual consumer remedy expressly authorizes "three times the amount of actual damages."<sup>381</sup> Had the legislature intended to permit the award of "actual damages" only in an individual consumer action it surely would have said so with the same clarity used in the class action and public enforcement provisions.<sup>382</sup> Third, in every case where the legislature has vested the trial courts with discretion in awarding multiple damages it has always provided a

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376. Compare the following discussion of the position of the attorney general with Comment, *Breach of Warranty and Treble Damages Under the Texas Deceptive Trade Practice and Consumer Protection Act*, 28 BAYLOR L. REV. 395 (1976), which argues that trebling of damages should be discretionary with the trial court in private actions under § 17.50(a)(2) of the DTPA for failure to comply with an express or implied warranty.

377. See TEX. BUS. & COMM. CODE ANN. § 17.50(b) (Supp. 1976-1977), quoted in note 371 *supra*.

378. See Bragg, *supra* note 272, at 18. But see Mallory v. Custer, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ) (court in dictum indicated treble damages are permissive), noted p. 861 *infra*.

379. TEX. BUS. & COMM. CODE ANN. § 17.51(b)(1) (Supp. 1976-1977) authorizes only "actual damages" in class actions.

380. *Id.* § 17.47(d), *inter alia*, authorizes the Consumer Protection Division to seek "actual damages" for persons injured by violations of § 17.46.

381. *Id.* § 17.50(b)(1).

382. Since the legislature did not authorize the award of actual damages only in § 17.50(b)(1), it would be inappropriate to insert it by judicial fiat. "When the legislature has carefully employed a term in one section of a statute and has excluded it in another, it should not be implied where excluded." *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 233 (5th Cir. 1972); accord, *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 648 (5th Cir. 1976); *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); see *FTC v. Sun Oil Co.*, 371 U.S. 505, 510-15 (1962). *Bott* is particularly instructive here, since the issue was whether the trial court was vested with the discretion in a suit on a debt to deny prejudgment interest where the statute in question did not expressly provide such discretion. In holding the matter nondiscretionary, the court relied heavily on the fact that another section dealing with the award of prejudgment interest for unliquidated damages expressly accorded such discretion to the trial court. *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 232-33 (5th Cir. 1972).

It is also useful to compare the specific grant of treble, as opposed to merely actual, damages in § 17.50(b)(1) with other consumer legislation passed by the Texas Legislature in which private causes of action were authorized. A private litigant under either the Texas Debt Collection Practices Act, TEX. REV. CIV. STAT. ANN. art. 5069-11.10 (Supp. 1976-1977), or the Texas Home Solicitation Transactions Act, TEX. REV. CIV. STAT. ANN. art. 5069-13.03(c) (Supp. 1976-1977), may sue for actual damages only, plus court costs and attorneys' fees. The point is that when the legislature intends to award only actual damages, it has shown itself perfectly capable of saying so.

standard to guide the exercise of that discretion.<sup>383</sup> The absence of such a standard in subsection 17.50(b)(1) is further evidence that no discretion was intended. Finally, to make trebling of damages permissive would undermine the two-fold purpose of the treble damage action—to provide an effective means for consumer redress and to deter violations of the law.<sup>384</sup> If a consumer cannot be certain from the outset that his damages will be trebled if he wins, it is unlikely that litigation—with its attendant costs and inconvenience—will be considered a viable alternative.<sup>385</sup> Moreover, if potential lawbreakers know

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383. For example, the Texas Securities Act authorizes purchasers of securities sold through material misrepresentations or omissions of fact to sue for “the consideration paid for the security, together with interest at 6% per year from the date of payment, less the amount of any income received on the security upon the tender of the security, or for damages if he no longer owns the security.” TEX. REV. CIV. STAT. ANN. art. 581-33.A(2) (1964). If the “false representation or omission is proven to be *willfully* made,” however, the statute authorizes the “award of punitive or exemplary damages in an amount not to exceed twice the actual damages.” *Id.* (emphasis added). Similarly, the Texas Actionable Fraud Statute authorizes private suits for actual damages where real estate or corporate stock is sold through false representations or promises. TEX. BUS. & COMM. CODE ANN. § 27.01(b) (1968). But the statute provides for the recovery of “exemplary damages not to exceed twice the amount of the actual damages” from any “person who *willfully* makes a false representation or false promise” or “who *knowingly* benefits from a false misrepresentation or false promise” in the sale of real estate or corporate stock. *Id.* § 27.01(c) (1968) (emphasis added). It is important to note not simply that both statutes provide a standard—“willfully” or “knowingly”—to determine when multiple damages are to be awarded, but that each specifically authorizes the award of actual damages, or restitution in the case of the plaintiff who still owns the fraudulent security, where that standard is not met. By contrast, § 17.40(b)(1) provides only for treble damages, makes no mention of actual damages, and is void of any standard of “willfulness” like that found in the Securities Act or the Actionable Fraud Statute. The only logical conclusion is that treble damages were intended to be mandatory. See Bragg, *supra* note 272, at 18.

In addition to the Securities Act and the Actionable Fraud Statute, the legislature had another model to follow had it wished to make discretionary the amount of damages awarded the plaintiff in a successful consumer action. The Massachusetts provision for private consumer lawsuits, which became effective October 9, 1972, provides that:

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the [unfair or deceptive] act or practice was a *wilful* or *knowing* violation. . . .

MASS. ANN. LAWS ch. 93A, § 11 (Michie/Law. Co-op 1975) (emphasis added). Once again, the failure to employ language so readily available to make treble damages discretionary can only evince a contrary intent.

384. Bragg, *supra* note 272 at 3.

385. The uncertainty as to whether exemplary damages would ultimately be awarded was one of the principal reasons—in addition to rigorous proof requirements—that common law fraud has never proven to be an effective means of redress for the consumer. First, the plaintiff can never be certain that the trier of fact will ultimately find the requisite degree of culpability on the part of the defendant. See, e.g., *Gale v. Spriggs*, 346 S.W.2d 620, 625 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.). Second, the plaintiff can never be certain of the amount of exemplary damages he will 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. *Burke v. Bean*, 363 S.W.2d 366, 368 (Tex. Civ. App.—Beaumont

that they may be answerable only for actual damages caused by their wrongful conduct, or may escape being sued altogether because of the consumer's uncertainty that treble damages will eventually be awarded, it is unlikely that they will be deterred from their unlawful conduct. Both these results are flatly contrary to the declared purpose of the Consumer Protection Act—"to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."<sup>386</sup>

It should be noted that, in addition to treble damages and court costs, a successful consumer is entitled to "attorneys' fees reasonable in relation to the amount of work expended." In *Volkswagen of America, Inc. v. Licht*<sup>387</sup> the court held that this phrase included work expended on appeal. It is recommended that an issue be submitted separately on attorneys' fees for trial, for appeal to the court of civil appeals, and for application for writ of error to the supreme court. A request for attorneys' fees on appeal made for the first time in the court of civil appeals "comes too late and [will be] denied."<sup>388</sup>

## V. CONCLUSION

This article has attempted a broad overview of the public and private rights and remedies under the Deceptive Trade Practices-Consumer Protection Act. Trying to explain what the "law" is under the DTPA, however, is especially difficult at this particular time. Virtually every advance sheet contains at least one case construing one or more sections

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1962, no writ). The only rule is that exemplary damages must be in reasonable proportion to the actual damages proven. See 17 TEX. JUR. 2d *Damages* § 187, at 256 (1960). Where courts find exemplary awards to be excessive, remittitur will be ordered. *Irwin v. Whirley*, 538 S.W.2d 150, 153 (Tex. Civ. App.—Waco 1976, no writ). This uncertainty is particularly inhibiting to consumers, since their actual damages or economic loss is frequently small. See generally P. WALD, *LAW AND POVERTY*: 1965 at 59-62 (1965); Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 403 (1966). See also Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 339 (1969):

If incentive [to sue] is important in antitrust law where large actual damage recoveries are usually in the offing, it is even more crucial in consumer protection law where recoveries are generally expected to be slight in each individual case although the injury to consumers as a class may be great.

*Id.* at 339.

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

387. 544 S.W.2d 442, 446 (Tex. Civ. App.—El Paso 1976, no writ).

388. *Central Adjustment Bureau, Inc. v. Gonzales*, 528 S.W.2d 314, 316-17 (Tex. Civ. App.—San Antonio 1975, no writ) (applying attorneys' fees provision in Texas Debt Collection Practices Act). For more discussion on the provisions of the Texas Debt Collection Practices Act, see note 382 *supra* and p. 773 *infra*.

of the DTPA. This process of judicial construction promises to continue at a vigorous pace for the foreseeable future, provided, however, that the DTPA continues to be used by victimized consumers to redress their grievances. In the unfortunate event that treble damages are ultimately held to be within the unbridled discretion of the trial courts, it is doubtful that the DTPA will see much additional litigation. Another difficulty for the writer on consumer law springs from the fact that the legislature is presently in session and is being presented with several proposals to weaken the DTPA.<sup>389</sup>

Texas Senate Bill 664, which passed the Texas Senate on March 30, 1977, will, if it becomes law, make several changes in the DTPA, many of which are significant. First, the definition of "services" will be amended to delete the "commercial or business use" exemption.<sup>390</sup> This will eliminate the anomaly between the definition of "goods" and "services" that presently exists in the DTPA. The business consumer will now be able to bring a treble damage action under section 17.50 over incompetent or deceptively represented "services" where under present law he may not. The definition of "consumer" will also be amended to add "governmental entity."<sup>391</sup> Governmental entities are major consumers of a vast array of goods and services and are entitled to the same standards of honest and fair dealing in the marketplace as are individuals, partnerships, and corporations, all of which are specifically included in the definition of "consumer." The proposed amendment would also define "unconscionable action or course of action."<sup>392</sup> The definition would generally condemn any conduct that either "takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree" or which "results in a gross disparity between the value received and the consideration paid, and the transaction involving transfer of consideration."<sup>393</sup>

The amendment would also affect the precedential value of FTC rules, regulations, and opinions in determining what is false, deceptive, or misleading in actions brought by *individual consumers* under section 17.50. Texas courts in private actions would be directed to use as a guide the interpretations given by the *federal courts*, and not the FTC, to section 5(a)(1) of the Federal Trade Commission Act.<sup>394</sup>

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389. Tex. S.B. 664, 65th Legislature (1977) (committee substitute).

390. *Id.* § 1.

391. *Id.* § 1.

392. *Id.* § 1.

393. *Id.* § 1.

394. *Id.* § 2.



To the "laundry list" of specifically prohibited practices in section 17.46(b) will be added a new item, which would prohibit representing that worker's services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts not replaced.<sup>395</sup> This section is designed to reach, among other service problems, misrepresentations made by automobile repair mechanics that expensive work was done when it was not.

Both the public enforcement venue provisions, section 17.47(b), and the private venue section, section 17.56, have been amended in two ways.<sup>396</sup> First, each section makes clear that any suit which "*alleges a claim to relief*" under the DTPA may be maintained in the counties mentioned. This change is intended to overrule the decision in *Doyle v. Grady*,<sup>397</sup> which concluded that the plaintiff had to prove a prima facie cause of action under the DTPA in order to maintain venue in the counties listed. Second, the state or a private plaintiff may bring a suit in any county where the defendant *has done* business.<sup>398</sup> The DTPA presently permits suits only where the defendant *is doing* business. This amendment will permit the traveling con-man to be sued in any county in which he has ever transacted business.

The proposed amendment would also change the "failure by any person to comply with an express or implied warranty" language to read "breach of an express or implied warranty."<sup>399</sup> This change is to comport the language of the DTPA with general warranty law that concerns "breaches of" rather than "failures to comply with" warranties.

The most significant change in the DTPA will be the provision for certain "defenses" to treble damages under the Act.<sup>400</sup> If any of the circumstances enumerated below are shown by the defendant, the proposed amendment provides that "actual damages only and attorneys' fees reasonable in the amount of work expended and court costs may be awarded."<sup>401</sup> The first defense is where the defendant shows that the action complained of resulted from "a bona fide error notwithstanding the use of reasonable procedures adopted to avoid the error."<sup>402</sup> The second defense is where the defendant "proves that he had no

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395. *Id.* § 3.

396. *Id.* §§ 4, 8.

397. 543 S.W.2d 893 (Tex. Civ. App.—Texarkana 1976, no writ).

398. Tex. S.B. 664, 65th Legis. §§ 4, 8 (1977) (committee substitute).

399. *Id.* § 5.

400. *Id.* § 6.

401. *Id.* § 6.

402. *Id.* § 6.

written notice that the consumers complained before suit was filed or that within thirty days after he was given written notice he tendered to the consumer (a) the cash value of the consideration received from the consumer or the cash value of the benefit promised, whichever was greater and (b) expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting his claim against the defendant."<sup>403</sup> In suits brought for breach of warranty, defendant has the defense of showing that he was not "given a reasonable opportunity to cure the defects from malfunctions before suit was filed."<sup>404</sup>

The proposed amendment to the DTPA is also intended to overrule the decision of the El Paso Court of Civil Appeals in *Volkswagen of America v. Licht*,<sup>405</sup> which held that a retailer had no action for indemnity against a manufacturer for damages caused a consumer for breach of warranty. Very simply, the amendment provides that indemnity and contribution are available in suits under the DTPA and that the person seeking indemnity is authorized to recover *his* attorneys' fees and court costs.<sup>406</sup>

The amendment would also strengthen postjudgment relief. At present, section 17.59 enumerates certain powers of a receiver who is to be appointed if a judgment entered under the Act has not been satisfied. The problem with the present provision is that only property that can be traced to the unlawful practice may be received by the court appointed receiver. New section 17.59 would provide certain presumptions that arise after a judgment has not been satisfied, all of which would support the appointment of a receiver over the defendant's business or his finances.<sup>407</sup> The defendant will be permitted to show cause why a receiver should not be appointed but he must rebut each of the four presumptions.<sup>408</sup>

Lastly, the amendment would delete the class action provisions of the Act, section 17.51 through 17.54.<sup>409</sup> The class action provisions were inserted in the DTPA in the first place because of the uselessness of present Texas rule 42.<sup>410</sup> The Texas Supreme Court is presently

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403. *Id.* § 6.

404. *Id.* § 6.

405. 544 S.W.2d 444 (Tex. Civ. App.—El Paso 1976, no writ).

406. Tex. S.B. 664, 65th Legis. § 7 (1977) (committee substitute).

407. *Id.* § 9.

408. *Id.* § 9.

409. *Id.* §§ 10-13.

410. See Jaworski & Padgett, *The Class Action in Texas: An Examination and A Proposal*, 12 Hous. L. REV. 1005 (1975); McElroy, *Class Action Practice in Texas State Courts*, 39 TEX. B.J. 321 (1976).

considering amending rule 42 in such a way as to parallel federal rule 23. Adoption of this amended rule 42 would, of course, accomodate any consumer class action that might heretofore have been brought under the specific class action provisions of the DTPA.

How these proposals will fare remains to be seen. What is clear, however, is that the last word on the DTPA—whether from the courts or the legislature—has yet to be spoken.