



12-1-1977

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Recommended Citation

Patricia E. Swanson, *The Texas Deceptive Trade Practices - Consumer Protection Act: Application to Professional Malpractice.*, 8 ST. MARY'S L.J. (1977).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol8/iss4/7>

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COMMENTS

THE TEXAS DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT: APPLICATION TO PROFESSIONAL MALPRACTICE

PATRICIA E. SWANSON

The traditionally dominant theme in American commercial law, caveat emptor, has now been replaced by caveat vendor under the Texas Deceptive Trade Practices—Consumer Protection Act¹ (DTPA). Because this statute was so recently enacted, its full impact has yet to be realized.² The DTPA seeks not only to protect consumers from deceptive practices in transactions involving goods, but also specifically includes services within its scope.³ While the courts may construe the Act as being applicable only to services commonly considered commercial in nature, it is quite possible that the DTPA will be expanded to include the area of professional malpractice.⁴

As yet, there is no precedent for applying the DTPA to professional misconduct, but the Act is such novel legislation that the courts have had little opportunity to construe the statute and set precedents in any area.⁵ Although professional malpractice may be a “prime area for expansion of the statute,”⁶

1. See TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Supp. 1976-1977); Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 717 (1976).

2. The DTPA was enacted in 1973 and amended in 1975. Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 698-99 (1976).

3. TEX. BUS. & COMM. CODE ANN. § 17.45(2) (Supp. 1976-1977).

4. Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 704 (1976).

Significantly, professional services appear to be taking on a more commercial character than in the past; the faithful family doctor has evolved into a businessman who never makes housecalls. Comment, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 U.C.L.A. L. REV. 401, 426 (1974).

5. Very few cases have been decided under the DTPA. Only one is remotely related to professional misconduct. In a state action, an attorney was held liable under the DTPA for conspiring with other nonprofessional defendants to defraud inexperienced real estate investors. *Bourland v. State*, 528 S.W.2d 350, 357-58 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). The state sued the attorney as an individual on grounds unrelated to his capacity as an attorney, but his involvement in the scheme originated when he was hired by other defendants as attorney for the development project. *Id.* at 352.

6. Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 704 (1976).

the courts may hesitate to open another area of recovery against professionals in light of the present medical malpractice crisis.⁷ If the Act is to be applied to professional misconduct, a corollary question is whether the treble damages provided in the statute are mandatory or permissive.⁸ If the provision is mandatory, large judgments, already difficult for the professional and his insurer to bear,⁹ could have an even more significant impact on the malpractice crisis if trebled.

This comment will examine the DTPA and its applicability to professional malpractice. Although the Act does not specifically mention professional services, its definitions and provisions appear to be sufficiently broad to include professional misconduct. Furthermore, there is no apparent logic in granting immunity to professionals if in fact their services are rendered in a deceptive or unconscionable manner. Many of the examples discussed herein deal with medical malpractice because medical cases are more numerous than other professional malpractice cases¹⁰ and the medical malpractice crisis is currently the area of greatest concern.¹¹ The principles discussed, however, should apply equally to other professionals, including pharmacists, attorneys, architects, engineers, and accountants.¹²

SCOPE OF THE DTPA IN RELATION TO PROFESSIONAL CONDUCT

The provisions of the DTPA are extremely broad in scope and none appear to preclude its application to professional malpractice.¹³ Section 17.44 provides for a liberal construction and application of the DTPA to promote its purposes, which are "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty."¹⁴ If a professional does employ deceptive tactics in rendering

7. See *Symposium—A Study of Medical Malpractice in Texas*, 7 ST. MARY'S L.J. 732, 733 (1976). But see Martin, *Preservative of Trial By Jury—Here We Go Again*, 39 TEX. B.J. 776 (1976), which presents statistics for Texas cities indicating there is no medical malpractice crisis.

8. See generally Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 18-19 (1976); Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 720 (1976).

9. *Symposium—A Study of Medical Malpractice in Texas*, 7 ST. MARY'S L.J. 732, 809 (1976).

10. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 162 (4th ed. 1971).

11. See *Symposium—A Study of Medical Malpractice in Texas*, 7 ST. MARY'S L.J. 732, 733 (1976).

12. Cf. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-63 (4th ed. 1971) (discussing applicability of medical cases to various professions in negligence rather than DTPA violations).

13. Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 704 (1976).

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

consumer services, only a very restrictive construction of the Act would preclude his liability, thereby attenuating its effect.

The definitions in section 17.45 are also broad enough to encompass professional services.¹⁵ "Services" are defined as "work, labor, or service purchased or leased for use, for other than commercial or business use, including services furnished in connection with the sale or repair of goods."¹⁶ This language indicates that "services" are not limited to activities relating to the sale or lease of goods and thereby opens the door to services which may seem less consumer-oriented.

The business use qualification in the definition of services may have some limiting effect on professional liability. The actual meaning of this limitation remains unclear,¹⁷ however, and several interpretations are possible.¹⁸ This ambiguity would best be eliminated by legislative amendment. Notwithstanding possible limitations, the business use qualification does not preclude applicability of the statute to professional services.

The DTPA provides relief for "consumers" adversely affected by deceptive practices.¹⁹ "Consumer" is defined in the Act as "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services."²⁰ The payment of professional fees is sufficiently analogous to

15. *See id.* § 17.45.

16. *Id.* § 17.45(2).

17. Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 706 (1976).

18. For example, a businessman might employ an accountant to prepare his personal income tax return as well as to do various tasks related to his business. If he suffers an injury due to the accountant's deceptive tactics, his personal cause of action would be remedied under the DTPA but the business use qualification may preclude its application to his business cause of action. *See Bragg, Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 5 (1976).

This interpretation is not entirely compatible with the Act, however, considering that the definition of "consumer" includes partnerships and corporations as well as individuals, which indicates businesses may also recover under the statute. *See TEX. BUS. & COMM. CODE ANN.* § 17.45(4) (Supp. 1976-1977).

The business use qualification may instead apply to situations where the professional is actually a part of the business, such as an attorney in the legal department or an accountant in the credit department, as opposed to a professional who does work for the business as well as for other clients as in the above example. In one case, for example, the plaintiff sought recovery against a doctor for his failure to advise her that an examination revealed the possibility of tuberculosis. The physician was employed by a company which the plaintiff had applied to work for, and the examination was given as a prerequisite to her employment. In that case the plaintiff was denied recovery because there was no doctor-patient relationship and the examination was solely for the company's benefit. *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705, 710 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.). A plaintiff in a similar situation would conceivably be no more successful under the DTPA if this interpretation of the business use qualification is correct.

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

20. *Id.* § 17.45(4).

"purchase of services" to allow recovery by a professional's client or patient under this definition.

The basic prohibition under the DTPA is found in section 17.46 which declares that "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful."²¹ "Trade" and "commerce" are defined as "the advertising, offering for sale, sale, lease, or distribution of *any* good or *service*."²² This definition is sufficiently broad to be construed as including professional services, and the use of the term "distribution" in the statute apparently would extend its effect to gratuitous voluntary services as well as to those for which payment is received. The DTPA further sets out a "laundry list" including twenty specific activities which are prohibited under the statute.²³ For example, one cannot "pass off" goods or services as those of another.²⁴ Another section prohibits misrepresentations as to the standards or quality of the goods or services.²⁵ While this list is not exclusive,²⁶ it is nonetheless sufficiently broad to proscribe any possible misrepresentation in the sale or distribution of services.²⁷

Only two specific exemptions are provided in the DTPA. The media who publish or disseminate violative advertisements are excluded unless the owners or employees knew of the unlawful deception or had a direct or substantial financial interest in the advertised goods or services.²⁸ The DTPA further exempts acts and practices specifically authorized by the Federal Trade Commission under section 5(a)(1) of the Federal Trade Commission Act, none of which appear to grant immunity to professionals.²⁹ Significantly, an attorney was held liable along with his client under the federal act for a violative collection letter which he prepared for the defendant company.³⁰

Had the legislature intended to exclude professional services from DTPA coverage, a professional exemption similar to the media exemption could have been enacted. In fact, an amendment to that effect was proposed, but was tabled during legislative hearing.³¹ While this evinces an intent to include professional conduct within the scope of the DTPA, perhaps

21. *Id.* § 17.46(a).

22. *Id.* § 17.45(6) (emphasis added).

23. *Id.* § 17.46(b).

24. *Id.* § 17.46(b)(1).

25. *Id.* § 17.46(b)(7).

26. *Id.* § 17.46(b).

27. Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 709 (1976).

28. TEX. BUS. & COMM. CODE ANN. § 17.49(a) (Supp. 1976-1977).

29. Compare *id.* § 17.49(b), with 15 U.S.C. § 45(a) (1970 & Supp. V 1975).

30. [1971] 2 TRADE REG. REP. (CCH) ¶ 7527, at 12,026.

31. TEX. H.R.J. 2115 (1973). An amendment was offered which would have read as follows: "(c) No provision of this Act shall apply to any individual practicing his or her profession only licensed by the State of Texas to practice a recognized profession in this state." *Id.*

the Act should be clarified by adding a provision to specifically include professional services. In California, for example, a deceptive advertising statute makes it unlawful to use deceptive practices in advertising "services, professional or otherwise."³² An amendment to the DTPA adding similar language would leave no doubt as to its applicability to professional services.

PRACTICAL APPLICATION OF THE ACT

The relationship between a professional and his client or patient is one of highest trust and confidence.³³ This special relationship enhances the need for honesty and integrity on the part of the professional. Realistically, however, professionals do not always live up to these high standards, and each profession has its incompetents.³⁴ Valid malpractice actions, including DTPA claims, should therefore be encouraged to compensate the injured and to promote more careful and adequate service.³⁵ Furthermore, since one of the underlying purposes of the treble damages provision is to provide an incentive to sue on small claims,³⁶ the DTPA could offer an excellent vehicle for eliminating or reducing deceptive practices in the professional area that result in small losses or relatively minor injuries, which would otherwise go uncompensated because of the risk and expense of litigation.

Since the focus under the DTPA is whether the implicit or explicit representations made by the professional are fulfilled,³⁷ the Act should not alter the traditional degree of care and skill required in actual performance, but rather provide a measure for honesty in dealings with the consumer. In other words, the DTPA would not impose strict liability for professional actions (such as a doctor performing surgery), but would impose strict liability regarding representations made by the professional in connection with his practice. Specifically, section 17.50(a)(2) provides relief for a consumer if he is adversely affected by "a failure by any person to comply with an express or implied warranty."³⁸ Because warranty is not defined in the Act, common law standards should be applicable.³⁹ While an implied

32. CAL. BUS. & PROF. CODE § 17500 (Deering 1976).

33. *Smith v. Dean*, 240 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1951, no writ); C. KRAMER, *THE NEGLIGENT DOCTOR* 18, 24 (1968).

34. It is clear for example, that incompetence exists among licensed physicians, and that some of them misrepresent the physical condition of their patients, their own skill and education, or the beneficial effect of their treatment. Comment, *Quackery in California*, 11 STAN. L. REV. 265, 266, 272 (1959). Certainly similar weaknesses occur in other professions.

35. See C. KRAMER, *THE NEGLIGENT DOCTOR* 16 (1968).

36. Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 720-22 (1976).

37. *Id.* at 704.

38. TEX. BUS. & COMM. CODE ANN. § 17.50(2) (Supp. 1976-1977).

39. Comment, *Breach of Warranty and Treble Damages Under the Texas Deceptive Trade Practices and Consumer Protection Act*, 28 BAYLOR L. REV. 395 (1976). Since

warranty of safety or good work is not found merely in the reassuring atmosphere of a doctor's or lawyer's office,⁴⁰ many express and implied warranties made by professionals may give rise to valid DTPA claims.

In one case, for example, a client received a letter from his attorney expressly representing that he would prosecute an appeal from the client's embezzlement conviction. Relying on this warranty the client paid the attorney and did not seek other counsel.⁴¹ In this situation, the attorney is arguably liable under the DTPA for any failure to comply with his representation.

Several medical malpractice cases dealing with sterilization procedures illustrate possible professional warranty violations under the DTPA. In *Doerr v. Villate*⁴² an Illinois court held that the plaintiff had stated a valid cause of action in alleging that the defendant doctor expressly promised to sterilize her husband and that as a result of her reliance on this promise a retarded child was born.⁴³ It appears that this type of express warranty concerning the effect of treatment, when breached, could be prosecuted under the DTPA. On the other hand, in *Terrell v. Garcia*⁴⁴ the San Antonio Court of Civil Appeals found that under similar circumstances the birth of a normal child did not result in any injury to the parents and denied recovery.⁴⁵ While the court recognized that the birth may have created additional economic burdens for the plaintiff, it found that the satisfaction, joy, and companionship of having children would outweigh such hardship.⁴⁶ A plaintiff may

professionals generally deal with services and not goods, the Uniform Commercial Code would not be applicable. Where goods are involved, the UCC definitions should obviously be consulted. The DTPA explicitly provides "that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in sections 2.314 through 2.318 of the Business & Commerce Code to involve obligations in excess of those which are appropriate to the goods." TEX. BUS. & COMM. CODE ANN. § 17.46(b)(19) (Supp. 1976-1977).

40. See *Custodio v. Bauer*, 59 Cal. Rptr. 463, 470-71 (Dist. Ct. App. 1967) (doctor does not impliedly warrant cures); *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1079 (Tex. Civ. App. 1904, no writ) (no implied warranty of legal success); Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 711 (1976).

41. *Ex parte Raley*, 528 S.W.2d 257, 258 (Tex. Crim. App. 1975) (postconviction habeas corpus proceeding where court allowed petitioner to return to point when notice of appeal was filed).

42. 220 N.E.2d 767 (Ill. Ct. App. 1966).

43. *Id.* at 770. In discussing damages awarded when negligence is not alleged, the court stated that only expenses and other naturally resulting damages can be recovered. *Id.* at 769. If it were determined that only minimal monetary damages resulted naturally from the breach, the DTPA treble damage provision could better compensate the victim. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976-1977).

44. 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), cert. denied, 415 U.S. 927 (1974).

45. *Id.* at 125. See generally Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140 (1976).

46. 496 S.W.2d at 128.

continue to experience similar problems in overcoming the public policy against awarding damages for the birth of an unwanted child, but since the DTPA provides relief for consumers who are "adversely affected" by breaches of warranty, it is conceivable that the DTPA would provide compensation for economic hardship, in contrast to the decision in *Terrell*.⁴⁷

Another breach of warranty might occur as a result of a physician's failure to render proper follow-up care after surgery. In accepting a patient, a physician impliedly warrants that he will render all related treatment.⁴⁸ If, for example, postoperative treatment indicates a necessity for blood tests to evaluate the patient's progress, the failure of the physician to perform or order such tests would constitute a breach of that implied warranty. If the breach adversely affects the patient, it would appear that relief could be obtained under the DTPA.

The foregoing examples are certainly not exhaustive of possible professional misconduct which could be included within the scope of the DTPA. In addition to the relief provided for proscribed activities included in section 17.46(b) and for breach of warranty, the Act provides protection from unconscionable acts or courses of conduct.⁴⁹ The term "unconscionable" is not defined in the Act, and although it has been frequently employed in cases involving the sale of goods, the courts have had difficulty in determining its exact meaning.⁵⁰ Thus, the impact of expanding the concept of unconscionability to services, professional or otherwise, remains unclear.

DAMAGES

Section 17.50(b) provides that each successful litigant under the Act "may" obtain treble damages, court costs, and reasonable attorneys' fees.⁵¹ There are various reasons for the allowance of treble damages. Possibly the most significant is that treble damages provide an incentive for consumers to sue on small claims and possibly offset the cost of litigation.⁵² While large

47. Compare TEX. BUS. & COMM. CODE ANN. § 17.50(a) (Supp. 1976-1977), with *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.). *cert. denied*, 415 U.S. 927 (1974).

48. See C. KRAMER, *THE NEGLIGENT DOCTOR* 24 (1968).

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

50. Anderson, *The Uniform Commercial Code and the Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 725, 729-30 (1976); Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 16-17 (1976).

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

52. Compare Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 3 (1976), with Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 745 (1972), and Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 721 (1976).

malpractice judgments are the most commonly publicized, this incentive factor for small claims could be instrumental in bringing to light professional misconduct resulting in minimal loss to the consumer, which would otherwise go unprosecuted due to the uncertainty and expense of litigation.

A second reason for allowing treble damages is its punitive effect; the provisions deter unscrupulous practices and deprive the defendant of the fruits of his deception.⁵³ In addition, the threat of treble damages serves to deter others from engaging in deceptive activities.⁵⁴ This deterrent effect is no less important in the professional area than in the commercial community.

Additionally, the threat of punitive damages encourages out of court settlements, thereby increasing consumer bargaining power.⁵⁵ Because of the superior training, knowledge, and skill possessed by a professional, there is often the possibility of unfairness or overreaching during negotiation.⁵⁶ An out of court settlement would compensate the victim, deter the wrongdoer, and save time and expense in litigation.⁵⁷ Thus, by equalizing the bargaining position between professionals and their clients or patients to some extent, the treble damage provision promotes the purposes of the statute.

Despite the soundness of allowing treble damages, it is presently unclear whether they should be automatically awarded upon a finding of actual damages or awarded only within the court's discretion.⁵⁸ Very few cases have resulted in a judgment for damages under the DTPA; in one such case actual damages were trebled without discussion as to whether such action was required by law.⁵⁹ In another case the Austin Court of Civil Appeals commented that treble damages were permissive rather than mandatory.⁶⁰ Neither case involved professional services.

53. Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 3 (1976); Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 720 (1976).

54. Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 721 (1976).

55. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 747-48 (1972).

56. SEC v. W.L. Moody & Co., 363 F. Supp. 481, 484 (S.D. Tex. 1973).

57. See Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 747-48 (1972).

58. Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 18-19 (1976); Comment, *Breach of Warranty and Treble Damages Under the Texas Deceptive Trade Practices and Consumer Protection Act*, 28 BAYLOR L. REV. 395, 403-04 (1976); see Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 720 (1976).

59. Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo 1975, no writ).

60. Volkswagen of America, Inc. v. Licht, 544 S.W.2d 442, 446 (Tex. Civ. App.—El Paso 1976, no writ) (trial court awarded treble damages and attorneys' fees, but only attorneys' fees discussed on appeal); Mallory v. Custer, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ) (dictum), noted p. 861 *infra*.

A comparison of the DTPA provision to a similar treble damage provision in federal antitrust law does little to clarify the problem because of the difference in their statutory language.⁶¹ While the antitrust provision is construed as allowing treble damages automatically,⁶² the language of the statute lends itself well to such interpretation by stating that the plaintiff “shall recover threefold the damages by him sustained.”⁶³ The DTPA, on the other hand, states that a consumer “may” recover treble damages.⁶⁴ This appears to strengthen the argument that such award is discretionary. The reasons for the treble damage provisions in both statutes are similar, however, and possibly the courts will look to the decisions in antitrust suits to answer this question.⁶⁵ If the incentive to sue is the most significant reason for allowing treble damages, it would be even more crucial in consumer protection cases where claims may be small, than in antitrust litigation, where recoveries are usually large.⁶⁶

In determining whether the treble damages provision is mandatory or permissive, its impact on professional malpractice should be considered. Traditionally, exemplary damages have been awarded only where a professional exhibited a conscious indifference to the consequences of his actions.⁶⁷ Because the DTPA has essentially eliminated the requirement of intent or scienter, it imposes strict liability for misrepresentations, even if innocently made.⁶⁸ Particularly in light of the current medical malpractice crisis and the typically larger recoveries in professional malpractice, this seems to be a harsh penalty for inadvertent professional misrepresentations. While this presents a persuasive argument for construing the treble damage provision as permissive and allowing the courts to determine its applicability from the facts of each case, the converse arguments for automatically imposing treble damages seem more compatible with the intent and the liberal construction provision of the DTPA.

61. Compare 15 U.S.C. § 15 (1970), with TEX. BUS. & COMM. CODE ANN. § 17.50 (Supp. 1976-1977).

62. *Klein v. American Luggage Works, Inc.*, 206 F. Supp. 924, 948 (D. Del. 1962), *rev'd on other grounds*, 323 F.2d 787 (3d Cir. 1963).

63. 15 U.S.C. § 15 (1970) (emphasis added).

64. TEX. BUS. & COMM. CODE ANN. § 17.50 (Supp. 1976-1977). For additional discussion see p. 671 *supra*.

65. See generally Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 720-21 (1976); Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286 (1973).

66. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 339 (1969).

67. See *Brooke v. Clark*, 57 Tex. 105, 113 (1882).

68. TEX. BUS. & COMM. CODE ANN. § 17.46(a) (Supp. 1976-1977). Intent elements are found in only four subsections. *Id.* § 17.46(b)(9), (10), (13), and (17). Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 718 (1976).

CONCLUSION

In light of the purposes of the Texas Deceptive Trade Practices—Consumer Protection Act, as well as its broad scope, there seems to be no reason to exclude professionals from its mandates. Considering the basic principle that granting immunity from fault breeds irresponsibility,⁶⁹ the purposes of the DTPA would be curtailed in the area of consumer services if professionals are granted immunity. Furthermore, many small claims which otherwise would go unprotected due to the expense and risk of litigation may now be compensated if the Act is construed to encompass professional services. Responsible professionals, like responsible businessmen, need not fear the Act, for its remedies are applied only after a court determination affording due process of law.⁷⁰ For full and complete consumer protection, the DTPA should be interpreted as encompassing deceptive or unconscionable practices by a professional rendering consumer services. Unless the legislature specifically removes professionals from the scope of the Texas Deceptive Trade Practices—Consumer Protection Act, the Act's provisions should be applied to incidents of professional malpractice.

69. C. KRAMER, *THE NEGLIGENT DOCTOR* 17 (1968).

70. See Lovett, *State Deceptive Trade Practice Legislation*, 46 *TUL. L. REV.* 724, 751 (1972).

Editor's Note—A proposed medical malpractice bill, Texas H.B. 1048, was approved by the Texas House of Representatives in March 1977 in its committee substitute form. This bill explicitly exempts health care providers from the purview of the DTPA.