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CONSUMER LAW—Damages—Treble Damages Are Discretionary
Under the DTPA

Mallory v. Custer,

537 S.W.2d 141 (Tex. Civ. App.—Austin 1976, no writ).

Custer took his camper for repairs to the defendant, Mallory, who was listed in the 1974 phone directory as an authorized “Coleman” recreational vehicle dealer and servicer. Even though Mallory’s Camping Center’s affiliation with Coleman ended in 1971, plaintiff was not so informed. The defendant attempted repair and charged plaintiff \$178.50, but the vehicle still did not function and plaintiff returned it to the Center. When defendant failed to do any additional work, plaintiff took the camper elsewhere to have the repairs completed. The plaintiff sued alleging that the defendant engaged in false, misleading, or deceptive practices by allowing confusion as to his association with Coleman—a violation of the Deceptive Trade Practices—Consumer Protection Act¹ [DTPA]. The trial court rendered judgment granting Custer “actual” damages plus treble damages and five hundred dollars attorneys’ fees. Held—*Affirmed*. Although treble damages are not mandatory under the DTPA, such judgment is permitted and will not be disturbed.²

The court read “may” in the first sentence of section 17.50(b) of the DTPA as making the granting of the specific remedies enumerated therein discretionary,³ and there is some support for this position.⁴ The purposes for granting punitive damages in consumer cases—encouraging consumers

1. The court entered judgment that the defendant violated TEX. BUS. & COMM. CODE ANN. § 17.46(b)(5) (Supp. 1976-1977). Since the plaintiff’s petition only alleged violation of § 17.46 of that statute and the defendant did not specially except to require more definite averments, the judgment was proper.

2. *Mallory v. Custer*, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ).

3. *Id.* at 143.

4. *Lynn, A Remedy For Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY’S L.J. 698, 720 (1976). Criteria from other contexts were suggested to guide the awarding of treble damages. The court should consider the deterrent effect on the defendant and on others of imposing a penalty, the need to compensate the plaintiff for the time he expended litigating, and the encouragement afforded other potential claimants. *Id.* at 720-21; see *Lightfoot v. MacDonald*, 544 P.2d 88, 91 (Wash. 1976) (treble damages discretionary under consumer protection statute); cf. *Brown v. Lyons*, 332 N.E.2d 380, 387 (Ohio C.P. Hamilton County 1974) (punitive damages allowed); *State ex rel. Johnson v. International Harvester Co.*, 548 P.2d 176, 177 (Ore. Ct. App. 1976) (injunction under Unlawful Trade Practices Act discretionary); *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656, 660 (Tex. Civ. App.—Amarillo 1975, no writ) (treble damages allowed); *O.R. Mitchell Motors, Inc. v. Bell*, 528 S.W.2d 856, 862 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.) (award of double time-price differential under Consumer Credit Code).

with small claims to sue and deterring deceptive and unfair practices⁵—may be realized by either mandatory or discretionary awarding of treble damages.

The statute provides for the issuance of orders necessary to effect restitution, but damages may not be properly awarded pursuant to this provision.⁶ “[A]ny other relief which the court deems proper,”⁷ while seemingly an all-inclusive proviso, probably should not provide a basis for granting damages.⁸ It appears that subsection 17.50(b)(1) alone authorizes an award of damages, and since it only allows treble damages, such damages should be deemed mandatory whenever damages are awarded.⁹

Although discretionary damages would undoubtedly be favored by many, to hold that such was the intent of the legislature would contradict the statute itself.¹⁰ The possibility that the consumer would not be compensated with treble damages would dampen his enthusiasm for litigation, and the possibility that the merchant could avoid this liability would encourage him to defend and continue the practices. This eventuality may thwart the policies behind the statute and result in less protection for consumers against false, misleading, and deceptive business practices.¹¹ Any further judicial dilution of the

5. Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 3 (1976); see Lynn, *A Remedy For Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 720-21 (1976).

6. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(3) (Supp. 1976-1977). This section provides “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.” (emphasis added). This provision contemplates giving restitution rather than the awarding of damages. These two remedies are clearly distinguishable. Damages are awarded to put the plaintiff in as good a position as if the contract had been bilaterally performed, while restitution puts the plaintiff in as good a position as if no contract had ever been executed. See *Coon v. Schoeneman*, 476 S.W.2d 439, 441 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). See generally *Bourland v. State*, 528 S.W.2d 350, 358 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (state's right to seek restitution under § 17.47(d) of DTPA).

7. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(4) (Supp. 1976-1977).

8. Since § 17.50(b)(4) grants any other proper relief including appointing a receiver or revoking licenses or other authorizations, damages should not be among the other remedies or relief granted under this provision. It could be argued that the rule of *ejusdem generis* would preclude the granting of any relief under this general provision, except relief of the same kind or class as the specific remedies included therein. It should be noted, however, that *ejusdem generis* is usually applied to statutes with general words that are preceded by specific enumerations. *Stanford v. Butler*, 142 Tex. 692, 698, 181 S.W.2d 269, 272 (1944); *Goldring v. Goldring*, 523 S.W.2d 749, 757 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.); see *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 582, 136 S.W.2d 800, 804 (1940) (dictum indicating rule not applicable in construction of mineral lease where general words precede specific). *But cf. United States v. Gilliland*, 312 U.S. 86, 92 (1941) (rule for interpreting word by its association with others not applied).

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

10. See *id.* § 17.44.

11. See Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 3 (1976).

DTPA would be particularly inappropriate in light of the various obstacles which consumers may encounter in securing any recovery at all.¹² Also, if treble damages are to be discretionary, some standards for their award would be necessary.¹³ The legislature did not make recovery of treble damages contingent on intent or negligence; in fact, no standards whatsoever to guide the awarding of such damages were included in the statute.¹⁴

The statute seems unequivocal on the awarding of "three times the amount of actual damages,"¹⁵ but there is confusion as to the application of this provision.¹⁶ In *Mallory*, the trial court entered judgment for \$170.70 actual damages, plus \$512.10 treble damages for violation of the DTPA.¹⁷ The Austin Court of Civil Appeals affirmed this award without discussion of the propriety of awarding actual damages.¹⁸ Although the additional sum above the treble damages could be justified as restitution,¹⁹ the failure to make this distinction could lead to improper results in other cases. The amount of the actual damages must be assessed, but only so that the court may mechanically triple that amount as dictated by the statute.²⁰ In all the other cases in which treble damages have been awarded pursuant to the DTPA, there has been no award of actual damages.²¹

The DTPA also provides for the recovery of attorneys' fees, reflecting the belief that the plaintiff and his attorney should be properly compensated for bringing an action that is beneficial not only to the litigant, but to the public

12. See *Beam v. Monsanto Co.*, 532 S.W.2d 175, 182 (Ark. 1976) (act not applicable to "vertical competition"); *Kohl v. Silver Lake Motors, Inc.*, 343 N.E.2d 375, 380 (Mass. 1976) (defendant may preclude penalty with reasonable settlement offer); *Neveroski v. Blair*, 358 A.2d 473, 479-80 (N.J. Super. Ct. App. Div. 1976) (real estate not "merchandise" under Consumer Fraud Act); *Town & Country Mobile Homes, Inc. v. Stiles*, 543 S.W.2d 664, 666-67 (Tex. Civ. App.—El Paso 1976, no writ) (treble damages award reversed; warranties made and breached before effective date of DTPA); *Littleton v. Woods*, 538 S.W.2d 800, 802-03 (Tex. Civ. App.—Texarkana 1976, writ granted) (DTPA not applicable to sale of realty; not in effect at time of sale); *Cape Conroe Ltd. v. Specht*, 525 S.W.2d 215, 218-19 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (plaintiff not consumer; warranties made before effective date of DTPA).

13. Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 19 (1976).

14. *Id.* at 19-21.

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

16. *Mallory v. Custer*, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ).

17. *Id.* at 143.

18. See *id.* at 143.

19. See TEX. BUS. & COMM. CODE ANN. § 17.50(b)(3) (Supp. 1976-1977).

20. *Id.* § 17.50(b)(1); see Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 19-20 (1976).

21. *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656, 660 (Tex. Civ. App.—Amarillo 1975, no writ); see *Town & Country Mobile Homes, Inc. v. Stiles*, 543 S.W.2d 664, 666-67 (Tex. Civ. App.—El Paso 1976, no writ) (reversing trial court because violation occurred before effective date of DTPA); *Littleton v. Woods*, 538 S.W.2d 800, 802 (Tex. Civ. App.—Texarkana 1976, writ granted) (treble damages not allowed because DTPA not applicable).

as a whole.²² Unlike other statutory attorneys' fee provisions that usually provide for "reasonable" compensation,²³ the DTPA mandates that "attorneys' fees reasonable in relation to the amount of work expended" be awarded.²⁴ Basing the granting of attorneys' fees on effort expended, rather than merely on the amount of the plaintiff's recovery, will encourage thorough and expert preparation of cases and will also provide attorneys who would otherwise hesitate to litigate in this field more incentive to do so. One commentator, however, foresees the possibility that this criterion could make single claimant's suits more attractive than large class actions, unless the court could, within its discretion, base the attorneys' fees in such suits on a percentage of the recovery.²⁵

Although the granting of some attorneys' fees is mandatory in a proper case,²⁶ the actual amount of such fees is discretionary with the qualification that they be based on the attorneys' efforts.²⁷ In cases in which treble damages were allowed, attorneys' fees were also granted, and none of these awards have been reversed.²⁸ The trial court's award of attorneys' fees for appeal of the case, with payment made contingent on appeal actually being taken, is also proper because this work is as essential to securing recovery as is the work on the trial itself.²⁹ By the same reasoning, a claimant under

22. Lynn, *A Remedy For Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 721 (1976). The granting of attorneys' fees, in addition to treble damages, ensures that attorneys are compensated while still providing adequate recompense for the plaintiff above any actual loss he may have incurred. This result will maintain the desired impetus for plaintiffs with small claims to sue and for competent attorneys to represent them. See *id.* at 721-22.

23. See, e.g., TEX. INS. CODE ANN. art. 3.62 (1963); TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1976-1977); *id.* art. 5236e, § 4(a), (b).

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

25. Lynn, *A Remedy For Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 721-22 (1976).

26. The considerations that compel mandatory treble damages also apply to the awarding of attorneys' fees. See notes 5-14 *supra* and accompanying text.

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

28. Volkswagen of America, Inc. v. Licht, 544 S.W.2d 442, 446 (Tex. Civ. App.—El Paso 1976, no writ) (fees for appeal as well as trial); Mallory v. Custer, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ) (\$500 for trial); Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656, 660 (Tex. Civ. App.—Amarillo 1975, no writ) (\$500 for trial). There has been no challenge for abuse of discretion or on any other grounds specifically levied against the award of attorneys' fees in these cases. A case in which treble damages and attorneys' fees were granted by the trial court was reversed on appeal, but only because relief under § 17.50 of the DTPA was improper. Town & Country Mobile Homes, Inc. v. Stiles, 543 S.W.2d 664, 666 (Tex. Civ. App.—El Paso 1976, no writ) (\$5,000 attorneys' fees for trial).

29. Volkswagen of America, Inc. v. Licht, 544 S.W.2d 442, 446 (Tex. Civ. App.—El Paso 1976, no writ) (\$500 for appeal to court of civil appeals, \$50 if no writ, \$750 if writ granted). In *Licht* the court relied on Security Life Ins. Co. v. Spray, 468 S.W.2d 347 (Tex. 1971), which upheld the trial court's award of attorney's fees for appeal in a suit under the Insurance Code which allowed recovery of "reasonable attorney fees for the prosecution and collection of such loss." 544 S.W.2d at 446.