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An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented.

Edmond R. McCarthy Jr.

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AN ANALYSIS OF THE 1979 TEXAS DECEPTIVE TRADE PRACTICES ACT AND POSSIBLE RAMIFICATIONS OF RECENT AMENDMENTS: IS THE ACT STILL CONSUMER ORIENTED?

EDMOND R. McCARTHY, JR.

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"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field."¹

The Texas Deceptive Trade Practices Act (TDTPA), as amended by the Sixty-sixth Texas Legislature, became law on August 27, 1979.² The amendments were designed to protect consumers against false, misleading, and deceptive business practices, while guarding the interests of hon-

1. H.R. CONF. REP. No. 1142, 63rd Cong., 2d Sess. 19 (1914), *quoted in* FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 312 n.2 (1933).

2. *See* 1979 Tex. Gen. Laws, ch. 603, § 10, at 1332 (amendments to Deceptive Trade Practices—Consumer Protection Act (TDTPA) introduced by Senate Bill 357 and House Bill 744). The 1979 amendments do not affect "either procedurally or substantively a cause of action that arose either in whole or in part prior to the effective date of this Act." *Id.* § 9, at 1332. Therefore, practioners should keep handy their "pocket part" versions of chapter 17 of the Texas Business and Commerce Code for any cause of action which arose prior to August 27, 1979. *Id.* § 9, at 1332.

est businessmen.³ Critics of the 1979 revisions contend the removal of mandatory treble damages above one thousand dollars⁴ and the elimination of private causes of action under the Act's "omnibus clause"⁵ have reduced the deterrent effect of the TDTPA.⁶ Opposition to the revisions is based upon fear that the amendments will diminish the protection of consumer rights.⁷ Critics contend the amendments enable some persons

3. See *Debate on S.B. 357 Before the Entire Senate*, 66th Tex. Leg. 1-2, 8 (Apr. 4, 1979) (unpublished transcript of Texas Senate proceeding) (amendments needed to bring balance to marketplace, as pendulum has swung too far away from protecting seller's rights) [Hereinafter cited as *Senate Debate of 4 April 79*]; *Hearing on S.B. 357 Before the Senate Economic Development Committee*, 66th Tex. Leg. 3 (Mar. 5, 1979) (unpublished transcript of Texas Senate proceeding) (TDTPA needs to vigorously prosecute culpable misconduct, not penalize incorrect speech, mistakes, or errors in judgment) [Hereinafter cited as *Hearing on S.B. 357*]; *Hearing on H.B. 744 Before the House State Affairs Committee*, 66th Tex. Leg. 5, 8 (Feb. 26, 1979) (unpublished transcript of Texas House of Representatives proceeding) (H.B. 744 attempts to treat everyone fairly, not punish innocent as well as guilty) [Hereinafter cited as *Hearing on H.B. 744*].

4. Compare 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(b)(1), at 327 (prevailing consumer awarded three times actual damages) with TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1980) (absent proof of knowledge, only first one thousand dollars actual damages shall be trebled).

5. "Omnibus Clause" as used herein refers to the language found in 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.46(a), at 323, as amended by TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1980), which provides that "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are . . . declared [illegal] . . ." This language was adopted from section (5)(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976) (FTCA). Under the 1979 TDTPA the "omnibus clause" may only be utilized by the Consumer Protection Division of the Attorney General's Office. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1980).

6. See *Debate on S.B. 357 Before the Entire Senate*, 66th Tex. Leg. 17 (Apr. 10, 1979) (unpublished transcript of Texas Senate proceeding) (vote for S.B. 357 would encourage litigation rather than settlement and bury Consumer Protection Act of 1973) [Hereinafter cited as *Senate Debate of 10 April 79*]; *Hearing on S.B. 357*, *supra* note 3, at 46-48, 54; O'Gorman, *Omnibus Clause and Settlement Procedure* 1-2 (1979) (unpublished essay available from the State Bar of Texas) (neither the "omnibus clause" nor mandatory use of federal precedent by Texas courts available in private cause of action) [Hereinafter cited as O'Gorman, *Omnibus Clause and Settlement Procedure*].

7. See *Senate Debate of 4 April 79*, *supra* note 3, at 1 (Sen. Schwarz—proposed amendments to TDTPA "destructive to the principle of honest dealings between tradesmen and consumers"); Doggett, *Damages from Deception—Effect of the 1979 Amendments* 1 (1979) (unpublished essay available from author) (S.B. 357's amendments limit counsel's ability to protect consumers) [Hereinafter cited as Doggett, *Damages from Deception*]; O'Gorman, *Omnibus Clause and Settlement Procedure*, *supra* note 6, at 2 ("prescription that any unfair act is forbidden by [TDTPA] no longer valid") (TDTPA lost flexibility to punish unfair practices not on "laundry list"). *But cf.* Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 748 (1972) (discussing harassing consumer recoveries). "Consistently liberal financial rewards for consumer . . . could yield a lucrative nuisance value for irresponsible . . . attorneys, . . . [to] impose unreasonable harassment upon business . . ." Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 748

to circumvent consumer interests, and have labeled the TDTPA a "Consumer Destruction Act" rather than a "Consumer Protection Act."⁸ Proponents of the 1979 amendments, however, contend the TDTPA has retained its "consumer protection" character,⁹ providing incentives for consumers to settle rather than litigate their grievances.¹⁰ Texas courts must now determine whether the revised TDTPA can bring balance to the Texas marketplace, while continuing to provide efficient and economical methods of protecting consumers from false, misleading, and deceptive practices.¹¹

I. ORIGINS OF STATUTORY CONSUMER REMEDIES IN TEXAS

In 1967 the Texas Interest—Consumer Credit and Consumer Protec-

(1972); see *Hearing on H.B. 744, supra* note 3, at 5 (treble damages a hammer in consumer's hand to force seller to settle knowing he can not win).

8. See *Hearing on S.B. 357, supra* note 3, at 17; *Senate Debate of 4 April 79, supra* note 3, at 1; Doggett, *Damages from Deception, supra* note 7, at 1; Doggett, "How Much Does It Hurt?"—*Damages Under the 1979 Amendments to the DTPA—Consumer Protection Act 1 (1979)* (unpublished essay available from the State Bar of Texas) [Hereinafter cited as Doggett, "How Much Does It Hurt?"].

9. See *Hearing on S.B. 357, supra* note 3, at 2 (S.B. 357 intended to retain protection from fraud in the marketplace; yet keep it free from "legal blackmail"); *Hearing on H.B. 744, supra* note 3, at 5, 8 (H.B. 744 attempts to be fair to both sides: when fraud is found, give consumer treble damages); Letter from Senator Bill Meier to Members of Texas Senate (Mar. 28, 1979) (unpublished letter on file with Sen. Bill Meier's Office, Capitol Station, Austin, Texas) (S.B. 357 strikes fair balance in marketplace, while retaining means to punish fraud through damages and court costs). The TDTPA provides for the mandatory trebling of the first one thousand dollars of actual damages, plus the amount of actual damages which exceed one thousand dollars. See *TEX. BUS. & COM. CODE ANN.* § 17.50(b)(1) (Vernon Supp. 1980). It also calls for the mandatory recovery of attorneys' fees and court costs by prevailing consumers. *Id.* § 17.50(d). The TDTPA has maintained an incentive for consumers to seek redress, even for minor claims, while deterring sellers from engaging in deceptive practices in a fashion similar to that found in the original TDTPA. Compare *id.* § 17.50(b)(1) (consumer awarded actual damages plus two times amount of actual damages not exceeding one thousand dollars) (if act proved "knowingly" consumer can recover up to three times amount of actual damages exceeding one thousand dollars) and *id.* § 17.50(d) (attorneys' fees and court costs awarded successful consumer) with 1973 *Tex. Gen. Laws*, ch. 143, sec. 1, § 17.50(b)(1), at 327 (prevailing consumer awarded three times actual damages plus attorneys' fees, court costs).

10. See *TEX. BUS. & COM. CODE ANN.* § 17.50A (Vernon Supp. 1980); Boyle, *1979 Amendments to the Deceptive Trade Practices Act: Elements of Proof and Breach of Warranties 5-6 (1979)* (unpublished essay available from the State Bar of Texas) [Hereinafter cited as Boyle, *Elements of Proof and Breach of Warranties*]; O'Gorman, *Omnibus Clause and Settlement Procedure, supra* note 6, at 2-3. But see *Senate Debate of 10 April 79, supra* note 6, at 17 (S.B. 357 encourages consumer litigation not settlement). See generally *Hearing on S.B. 357, supra* note 3, at 7, 9 (TDTPA designed to promote incentives for conciliation and settlement).

11. See *TEX. BUS. & COM. CODE ANN.* § 17.44 (Vernon Supp. 1980).

tion Act¹² was revised with the addition of chapter ten, Deceptive Trade Practices.¹³ Under the revised statute persons engaging in deceptive trade practices could be enjoined from using deceptive practices.¹⁴ The Consumer Protection Division of the Attorney General's Office was authorized, at the request of the Consumer Credit Commissioner, to seek an injunction against a seller who engaged in a practice violating the Act's "laundry list."¹⁵ Injunctive relief, however, was not made available to private consumers.¹⁶

12. See 1967 Tex. Gen. Laws, ch. 274, § 1, at 608-09. The revision of Title 79 was prompted by the legislature's finding of facts and determination that:

(1) Many Citizens of our State are being victimized

(4) Unscrupulous operators, lenders and vendors, many of whom are transient to our State, are presently engaged in many abusive and deceptive practices in the conduct of their businesses

(5) These facts conclusively indicate a need . . . to prohibit deceptive trade practices in all types of consumer transactions,

(6) It is the intent of the Legislature in enacting this revision . . . to protect the citizens of Texas from abusive and deceptive practices now being perpetrated by unscrupulous operators, lenders and vendors in both cash and credit consumer transactions . . . and thus serve the public interest of the people of the state.

Id.

13. See *id.* § 2, arts. 10.01-.05 at 659-60 (chapter ten of Texas Interest—Consumer Credit and Consumer Protection Act, Deceptive Trade Practices, codified as TEX. REV. CIV. STAT. ANN. arts. 5069-10.01-.05 (Vernon 1970)).

14. See 1967 Tex. Gen. Laws, ch. 274, § 2, arts. 10.02, 10.04, at 658-59.

15. See *id.* art. 10.04, at 658-59; D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION §§ 3.01, 3.05, at 72, 78 (1978). The term "laundry list," as used hereinafter, refers to the several specifically enumerated acts or practices contained in this and other "deceptive trade practices" laws, which are considered to be *per se* illegal. See Spradling v. Williams, 566 S.W.2d 561, 563 (Tex. 1978); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.E at 4-10 (1977), also printed in 8 ST. MARY'S L.J. 617, 625-34 (1977). Some of the acts declared to be deceptive are the representation of goods as being new or original if they are deteriorated, reconditioned, or second hand; knowingly making false or misleading statements of fact concerning the need for parts, replacement or repair service; and the disconnecting, turning back, or resetting of an odometer of any motor vehicle to reduce the mileage appearing on the odometer. See 1967 Tex. Gen. Laws, ch. 274, § 2, art. 10.01(b), at 658. See generally D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION viii, 254 (1978); Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 611 (1977); Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 698 (1976); Comment, *Measure of Damages For Misrepresentation Under the Texas Deceptive Trade Practices Act*, 29 BAYLOR L. REV. 135, 135-36 (1977).

16. Cf. 1967 Tex. Gen. Laws, ch. 274, § 2, art. 10.04, at 658 (by filing a written complaint with Consumer Credit Commissioner, consumer could get Attorney General to investigate alleged deceptive practices). See generally *id.* § 2, art. 10.04, at 658-59 (independent cause of action for private consumer unavailable).

This limited injunctive procedure was amended in 1969 to allow the Attorney General to independently seek injunctions against sellers engaging in deceptive practices.¹⁷ The 1969 amendments also expanded the scope of practices declared unlawful under the Texas Interest—Consumer Credit and Consumer Protection Act,¹⁸ by providing that Texas courts should construe the meaning of “deceptive practices” according to guidelines established by the Federal Trade Commission (FTC) and federal court interpretations¹⁹ of the Federal Trade Commission Act (FTCA).²⁰

The consumer protection laws enacted by Texas in 1967 and 1969 were the progeny of the Uniform Consumer Sales Practices Act (UCSPA),²¹ the Uniform Deceptive Trade Practices Act (UDTPA),²² and the FTCA.²³ Through the synthesis of these acts, Texas law incorporated the advantages available from both an “omnibus clause” and a “laundry list.”²⁴ The

17. See 1969 Tex. Gen. Laws, ch. 452, § 1, art. 10.04, at 1506; D. BRAGG, P. MAXWELL & J. LONGLEY, *TEXAS CONSUMER LAW* viii (1978).

18. See 1969 Tex. Gen. Laws, ch. 452, § 1, art. 10.01(b), at 1504-05.

19. See 15 U.S.C.A. §§ 41-45 (West Supp. 1979). Under the FTCA's test, the fact that an act or practice has the tendency or capacity to deceive is sufficient to render it “false, misleading, or deceptive.” *Id.* § 45(a)(1); see *American Life & Accident Ins. Co. v. FTC*, 255 F.2d 289, 293 (8th Cir. 1958) (fact evidence failed to show deception not conclusive, test is whether practice is likely to deceive); *Charles of the Ritz Dist. Corp. v. FTC*, 143 F.2d 676, 678-80 (2d Cir. 1944) (actual deception need not be shown); *FTC v. Hires Turner Glass Co.*, 81 F.2d 362, 363 (3d Cir. 1935) (defendant violated FTCA because his product had “tendency and capacity to . . . deceive”); Lynn, *Anatomy of A Deceptive Trade Practices Case*, 31 Sw. L.J. 867, 869 (1977); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, *TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS*, Ch.E at 2-4 (1977), also printed in 8 ST. MARY'S L.J. 617, 621 (1977); Project, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1056 n.107 (1967); Comment, *Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 440 (1973); Longley, *Consumer Protection* 7-8 (1978) (unpublished essay available from State Bar of Texas) [Hereinafter cited as Longley, *Consumer Protection*].

20. See *Spradling v. Williams*, 566 S.W.2d 561, 562-63 (Tex. 1978) (courts directed to use “capacity to deceive” test established by federal precedent); *State v. Credit Bureau of Laredo*, 530 S.W.2d 288, 293 (Tex. 1975) (statute directs courts to look at FTCA to interpret Texas statute); *Wesware, Inc. v. State*, 488 S.W.2d 844, 848 (Tex. Civ. App.—Austin 1972, no writ) (legislature intended courts follow law promulgated by federal courts as far as possible); 1969 Tex. Gen. Laws, ch. 452, § 1, art. 10.02(b), at 1505; cf. *Bourland v. State*, 528 S.W.2d 350, 355 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (court upheld jury charge that the issue was whether conduct had “capacity to deceive”).

21. See 7A U.L.A. BUSINESS AND FINANCE LAWS, UNIFORM CONSUMER SALES PRACTICES ACT 1-34 (1978).

22. See 7A U.L.A. BUSINESS AND FINANCE LAWS, UNIFORM DECEPTIVE TRADE PRACTICES ACT 35-90 (1978).

23. See 15 U.S.C. §§ 41-45 (1976).

24. See 1969 Tex. Gen. Laws, ch. 452, § 1, art. 10.02, at 1505 (“omnibus clause”); 1967 Tex. Gen. Laws, ch. 274, § 2, art. 10.01(b), at 658 (“laundry list”), as amended by 1969 Tex.

benefits derived from this action included: having a vast body of law upon which state courts could rely for guidance;²⁵ reducing the possibility of federal preemption of state consumer protection laws;²⁶ and providing consistency, thereby reassuring businessmen that the state's trade standards are substantially in line with those of interstate commerce and neighboring jurisdictions.²⁷

Despite the advantages derived from incorporating the "omnibus clause" and "laundry list" into the Texas act,²⁸ the statute failed to provide a private cause of action.²⁹ The absence of a private remedy constituted an "Achilles' Heel" on Texas consumer protection laws until 1973.³⁰

Gen. Laws, ch. 452, § 1, art. 10.01(b), at 1504-05 ("laundry list"). The "laundry list" sets out practices which are *per se* unlawful. To prevail, a consumer need only prove the practice occurred. See *Spradling v. Williams*, 566 S.W.2d 561, 563 (Tex. 1978); 1969 Tex. Gen. Laws, ch. 452, § 1, arts. 10.01(b), 10.02(a), at 1504-05; D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION §§ 3.01, 3.05, at 72, 78 (1978). See generally 7A U.L.A. BUSINESS AND FINANCE LAWS, UNIFORM DECEPTIVE TRADE PRACTICES ACT §§ 2-3, at 48-60 (1978) (1966 UDTPA); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.E at 4 (1977), also printed in 8 ST. MARY'S L.J. 617, 625 (1977).

25. See *Wesware, Inc. v. State*, 488 S.W.2d 844, 848 (Tex. Civ. App.—Austin 1972, no writ).

26. See, e.g., *McDermott v. Wisconsin*, 228 U.S. 115, 131-32 (1912); *Savage v. Jones*, 225 U.S. 501, 533 (1911); *Double-Eagle Lubricants, Inc. v. Texas*, 248 F. Supp. 515, 518 (N.D. Tex. 1965). See generally Project, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1136-39; Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 732-34 (1967).

27. See Comment, *Consumer Protection in Georgia: The Fair Business Practices Act of 1975*, 25 EMORY L.J. 445, 455 (1976). But cf. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("deceptive practices" a legal standard requiring judicial construction); Dole, *The Uniform Deceptive Trade Practices Act: Another Step Toward a National Law of Unfair Trade Practices*, 51 MINN. L. REV. 1005, 1052 (1967) (Uniform DTPA omitted damages remedy to avoid imposing liability for inadvertent deception under FTCA); Comment, *Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 439-40 (1973) (FTC interpretations do not give notice to persons subject to TDTPA of what is unlawful); Note, 54 N.C. L. REV. 963, 967-68 (1976) (state courts should give considerable weight to FTC judgment due to agency's expertise, but meaning of "deceptive practices" still question of law for the courts).

28. See 1969 Tex. Gen. Laws, ch. 452, § 1, arts. 10.01-.08, at 1504-09.

29. See generally *id.* § 1, arts. 10.01-.08, at 1504-09; 1967 Tex. Gen. Laws, ch. 274, § 2, arts. 10.01-.05, at 658-60.

30. Compare 1969 Tex. Gen. Laws, ch. 452, § 1, art. 10.04, at 1506 (no private cause of action) and 1967 Tex. Gen. Laws, ch. 274, § 2, art. 10.04, at 658-59 (no private cause of action) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50, at 326-27 (statutory remedy available to private consumer). The adoption of a private cause of action for deceptive trade practices was a reflection of the legislature's recognition of the inadequacies of common law remedies. See *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). At common law, the only remedy available to an aggrieved consumer was the tort action of fraud. A cause of action in fraud placed an onerous

In 1973, the Sixty-third Texas Legislature³¹ acknowledged the inadequacies of common law remedies and responded by enacting the Texas Deceptive Trade Practices and Consumer Protection Act (TDTPA).³² The 1973 statute was predominantly an adoption of prior Texas consumer legislation.³³ The TDTPA was based upon principles of fairness, and was designed to render deceptive trade practices unprofitable in Texas.³⁴ Under the 1973 TDTPA a consumer was allowed to bring a private cause of action for damages.³⁵ Consequently, consumer interests were

burden of proof upon the injured plaintiff. *See, e.g.,* McCall v. Trucks of Texas, Inc., 535 S.W.2d 791, 794 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); Brady v. Johnson, 512 S.W.2d 359, 361 (Tex. Civ. App.—Austin 1974, no writ); Panhandle & S.F. Ry. v. O'Neal, 119 S.W.2d 1077, 1079-80 (Tex. Civ. App.—Eastland 1938, writ ref'd); *cf.* Johnson v. Beneficial Management Corp., 538 P.2d 510, 513 (Wash. 1975) (cause of action for unfair or deceptive practices unknown at common law). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 685-86 (4th ed. 1971); Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 610-11 (1977).

31. The Sixty-third Legislature is commonly referred to as the "reform legislature" because it was the first meeting of Texas lawmakers following the 1971 "Sharpstown Scandal." *See* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION vii (1978); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.E at 1-2 (1977), also printed in 8 ST. MARY'S L.J. 617, 618 (1977).

32. *See* Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (Act resulted from legislative recognition of inadequacies of common law remedies). *See generally* 1973 Tex. Gen. Laws, ch. 143, sec. 1, §§ 17.41-63, at 322-43. The TDTPA's provisions for private remedies, section 17.50(a), and treble damages, section 17.50(b)(1), resulted in the Act's being heralded as the most far-reaching and significant piece of legislation enacted in 1973. *See* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION viii (1978); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.E at 2 (1977), also printed in 8 ST. MARY'S L.J. 617, 620 (1977); Nicewander, *The Impact of Consumer Laws on Your Everyday Practice*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 6 (1977).

33. *Compare* 1973 Tex. Gen. Laws, ch. 143, sec. 1, §§ 17.41-63, at 322-43 with 1969 Tex. Gen. Laws, ch. 452, § 1, arts. 10.01-.08, at 1504-09 and 1967 Tex. Gen. Laws, ch. 274, § 2, arts. 10.01-.05, at 658-60. *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION viii (1978); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.E at 2 (1977), also printed in 8 ST. MARY'S L.J. 617, 620-21 (1977); Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 612 (1977).

34. *See* Hill, *Foreward* to D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION v (1978).

35. *See* 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(a),(b)(1), at 326-27. Prior to the enactment of statutory remedies in 1973, Texas consumers were relegated to the use of common law fraud to redress damages for deceptive practices. *See* Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.); *cf.*

protected by promoting consumer action,³⁶ rather than relying upon public enforcement by the Attorney General.³⁷ Furthermore, the TDTPA was intended to deter unscrupulous vendors from engaging in deceptive practices by allowing injured consumers to recover "treble damages."³⁸

The need for allowing the recovery of three times the actual damages sustained by a consumer developed because of the small amount of damages usually involved in consumers cases.³⁹ Unscrupulous vendors were

Johnson v. Beneficial Management Corp., 538 P.2d 510, 513 (Wash. 1975) (concept of action for deceptive trade practices unknown at common law). See generally D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LAW vii (1978); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.E at 1 (1977), also printed in 8 ST. MARY'S L.J. 617, 617 (1977); see also D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 177 (1978); Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 613 (1977); Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 271 (1971) (private remedies desirable for consumer bargaining power and disciplining fraud in the marketplace); Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 749 (1972) (statutory remedy gives consumer leverage to obtain fair treatment).

36. See *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (act designed to encourage consumer to litigate grievances); *McDaniel v. Dulworth*, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ) (legislative intent to encourage consumer to seek redress); 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.44, at 322-23. Compare Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 3, 18 (1976) (treble damages evidence legislative intent to provide consumer incentive to sue on small claims) and Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 721 (1976) (treble damages awarded consumer encourages consumer redress and enhances statute's deterrent effect) and Comment, *The Texas Deceptive Trade Practices—Consumer Protection Act: Application to Professional Malpractice*, 8 ST. MARY'S L.J. 763, 769 (1977) (incentive for consumer litigation found in treble damages) with Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 745 (1972) (punitive damages serve function, but may tempt unwarranted claims).

37. See *Woods v. Littleton*, 554 S.W.2d 662, 670 (Tex. 1977) (treble damages create consumer incentive to file suit, lessening demand for public enforcement); Leikam & Corbin, *Woods v. Littleton: Consumerism Comes of Age*, 18 S. TEX. L.J. 477, 481 (1977) (treble damages reduce necessity for public enforcement actions). See generally D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION v-vi, § 8.01, at 177-79 (1978); Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 720-21 (1976); Comment, *The Texas Deceptive Trade Practices—Consumer Protection Act: Application to Professional Malpractice*, 8 ST. MARY'S L.J. 763, 769 (1977); Doggett, "How Much Does It Hurt?", *supra* note 8, at 5.

38. See, e.g., *Woods v. Littleton*, 554 S.W.2d 662, 669 (Tex. 1977) (legislature provided treble damages to deter unscrupulous sellers); *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (as a deterrent to unlawful conduct, consumer allowed recovery of treble damages under TDTPA); *McDaniel v. Dulworth*, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ) (legislature intended treble damages to deter unscrupulous sellers).

39. See D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 8.01, at

free to defraud consumers with virtual impunity because few consumers could afford to pursue a legal remedy for recovery of such small amounts.⁴⁰ This was particularly true considering the heavy burden of proof and high legal costs involved in consumer cases.⁴¹

Four years after implementation of the TDTPA, however, the question of whether treble damages were to be *mandatorily* awarded remained unanswered.⁴² The Texas Supreme Court finally resolved this issue in

176-77 (1978); Comment, *The Texas Deceptive Trade Practices—Consumer Protection Act: Application to Professional Malpractice*, 8 ST. MARY'S L.J. 763, 769 (1977); cf. *Woods v. Littleton*, 554 S.W.2d 662, 669-70 (Tex. 1977) (treble damages encourage consumers to sue); *McDaniel v. Dulworth*, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ) (treble damages an incentive for consumer redress). See generally Nicewander, *The Impact of Consumer Laws on Your Everyday Practice*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 1 (1977); *Hearing on S.B. 357*, supra note 3, at 46; Longley, *Consumer Protection*, supra note 19, at 1. It has been argued treble damages were intended as a penalty against the seller. See, e.g., *Riverside Nat'l Bank v. Lewis*, 22 Tex. Sup. Ct. J. 212, 215 (Feb. 10, 1979); *Spradling v. Williams*, 566 S.W.2d 561, 565 (Tex. 1978) (Greenhill, C.J., concurring); *Singleton v. Pennington*, 568 S.W.2d 367, 375-76 (Tex. Civ. App.—Dallas 1977, writ granted).

40. Cf. *Walker v. Sheldon*, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 492 (1961) (infrequent litigation will not deter illicit business). In *Walker v. Sheldon*, the New York Court of Appeals noted:

In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will be returned to those victims who object too vigorously and he will be perfectly content to bear the additional cost of infrequent litigation as the price for continuing his illicit business.

Id. at 499, 223 N.Y.S.2d at 492.

41. See Telephone interview with David Bragg, Chief of the Consumer Protection Division, Office of the Attorney General of the State of Texas, in Austin (Jan. 9, 1980). See generally D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 8.01, at 176-77 (1978); Hill, *Foreword to D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION v* (1978); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.E at 1 (1977), also printed in 8 ST. MARY'S L.J. 617, 618 (1977); Nicewander, *The Impact of Consumer Law on Your Everyday Practice*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 1 (1977); Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 609-10 (1977); Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 271-74 (1971); Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 747-48 (1972); Lynn, *A Remedy For Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 721 (1976); Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 409 (1966).

42. Compare *Mallory v. Custor*, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ) (treble damages permissive not mandatory under TDTPA) with *McDaniel v. Dulworth*, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ) (treble damages like attorneys' fees mandatory not discretionary under TDTPA).

*Woods v. Littleton*⁴³ holding treble damages were mandatory once liability under the Act was established.⁴⁴ *Woods* and its progeny, however, placed an inequitable economic burden upon some businesses⁴⁵ and led to the introduction of Senate Bill 357 in 1979.⁴⁶

II. ANALYSIS OF THE 1979 AMENDMENTS

The 1979 revisions to the Texas Deceptive Trade Practices and Consumer Protection Act (TDTPA) are a renewed effort to establish a working equilibrium between consumers and vendors in the marketplace. The amendments are designed to achieve an equitable solution to the problem of consumer fraud by striking a balance between consumer needs and the

43. 554 S.W.2d 662 (Tex. 1977).

44. *Id.* at 671. The Texas Supreme Court ruled: "[c]onsidering the structure of the Statute as a whole and its declared purpose, it is clear the award of treble damages is made mandatory." *Id.* at 671. See generally Lynn, *Anatomy of A Deceptive Trade Practices Case*, 31 Sw. L.J. 867, 878-79 (1977).

45. Cf. Longoria v. Atlantic Gulf Enterprises, Inc., 572 S.W.2d 71, 76 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (prevailing consumer receives mandatory treble damages); Bowman v. Woodmansee, 554 S.W.2d 33, 34 (Tex. Civ. App.—Austin 1977, no writ) (treble damages mandatory under section 17.50(b)(1)); Fambrough, *Let the Realty Industry Beware: The Death of Caveat Emptor*, TIERRA GRANDE, 1978, at 6 (TDTPA encourages consumer suits, not protection of merchants).

46. In his introductory remarks to House Bill 744, Representative Danny Hill described the mandatory treble damages of the TDTPA as a "hammer in the hands of the plaintiff's attorney in order to force a settlement because [the defendant] cannot win." See *Hearing on H.B. 744*, supra note 3, at 5. To remedy this inequity Senator Bill Meier evidenced his intent to introduce "fault" and "intent" as the standard for recovery of treble damages and thereby bring balance back into the marketplace. He described the TDTPA, then in effect, as a statute that is so one sided that it practically constituted "legal blackmail." See *Hearing on S.B. 357*, supra note 3, at 1-2. Mr. R. Jack Ayers, Jr., a Dallas attorney testifying before the Senate Economic Development Committee in favor of S.B. 357, commented:

[P]eople can be penalized in treble damages for incorrect speech, mistakes, . . . and that sort of thing. . . . [T]hat is one of the things that Senate Bill 357 seeks to rectify. Without some requirement that the consumer establish and prove a case [under the TDTPA], I don't know how the persons who are involved in the sale of goods . . . will ever have their arms in a consumer transaction anywhere close to an equal level [with consumers].

Id. at 3 (emphasis added). See generally Doggett, "How Much Does It Hurt?", supra note 8, at 6. "Promoters of S.B. 357 emphasized that treble damages mandated against 'innocent' businesses constituted the justification for a major overhaul of the DTPA." Doggett, "How Much Does It Hurt?", supra note 8, at 6. See also Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 745 (1972). Punitive damages up to a certain level serve a valuable purpose; however, "as consumer recoveries become enriched by double or treble damages, the temptation for unwarranted claims may also increase. Therefore, a greater constraint against harassment may be required when punitive damages are easily obtained by consumers." Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 725 (1972).

burden imposed upon businesses.⁴⁷ In an effort to achieve these objectives Senate Bill 357, as enacted,⁴⁸ amends six sections⁴⁹ and adds two new sections⁵⁰ to the TDTPA.⁵¹

A. Cumulative Remedies

The cumulative remedies section has retained the essence of the original TDTPA.⁵² The remedies made available by the TDTPA are of a cumulative rather than exclusive nature;⁵³ therefore, it is possible for a deceptive practice to be actionable under both the TDTPA and another law.⁵⁴ To recover damages under the TDTPA in addition to those available at common law or under another statute, a plaintiff must establish the existence of an act or practice in violation of the TDTPA.⁵⁵ This limitation will not apply, however, if the statute serving as the basis of the plaintiff's action expressly recites that an act or practice in violation of its provisions is actionable under the TDTPA as well.⁵⁶ Remedies under the TDTPA will cease to be cumulative if the recovery of actual damages and assessment of penalties are available under both laws to redress the same act or practice.⁵⁷ These limitations and guidelines were enacted to achieve

47. See *Hearing on H.B. 744, supra* note 3, at 1, 5; *Hearing on S.B. 357, supra* note 3, at 1-4.

48. See 1979 Tex. Gen. Laws, ch. 603, § 1, at 1327-32.

49. See TEX. BUS. & COM. CODE ANN. §§ 17.43, 17.45(9), 17.46, 17.50, 17.50A, 17.56 (Vernon Supp. 1980).

50. See *id.* §§ 17.50B, 17.56A.

51. See *id.* §§ 17.41-63.

52. Compare *id.* § 17.43 with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.43, at 322. See generally Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices — Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 2 (1979).

53. See TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1980).

54. See *id.*

55. See *id.* Section 17.43 recites in pertinent part, "[t]he remedies provided . . . are in addition to . . . remedies provided for in any other law, . . ." *Id.* (emphasis added). Although section 17.43 does not state whether the "other law[s]" are state or federal laws, the construction given to the TDTPA under section 17.44 implies that it refers to both federal and state laws. Cf. *Woods v. Littleton*, 554 S.W.2d 662, 669 (Tex. 1977) (section 17.44 given liberal construction); *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (TDTPA intended to give greatest amount "actual damages" proved).

56. See TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1980). Articles 5221f and 6701g-2 of Vernon's Revised Texas Civil Statutes make a violation of their provisions a violation of the TDTPA. See TEX. REV. CIV. STAT. ANN. art. 5221f, § 17(d) (Vernon 1971 & Supp. 1979) & art. 6701g-2, § 8 (Vernon Supp. 1980).

57. See TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1980). "[N]o recovery shall be permitted under both . . . [the TDTPA] . . . and another law of both actual damages and penalties for the same act or practice." *Id.*

two purposes: prevention of multiple recovery of damages for a single act or practice,⁵⁸ and preclusion of the use of "bootstrapping" to escalate a violation of another law into a suit for treble damages under the TDTPA.⁵⁹

B. *Unlawful Deceptive Trade Practices*

The 1979 TDTPA continues the prohibition against unlawful deceptive trade practices in consumer transactions.⁶⁰ There are, however, some substantial changes in what constitutes an unlawful deceptive trade practice. Although the "omnibus clause" is retained by the amendments to the TDTPA, the clause no longer provides the broad umbrella of protection enjoyed by consumers under the original TDTPA.⁶¹ Conduct considered unlawful under the "omnibus clause" is subject to prosecution only by the Consumer Protection Division of the Attorney General's Office.⁶² When utilized by the Attorney General the "omnibus clause" is still to be construed by Texas courts in accordance with federal interpretations given to the pertinent sections of the FTCA.⁶³ Armed with the "omnibus

58. *See id.*; cf. *American Transfer & Storage Co. v. Brown*, 584 S.W.2d 284, 293 (Tex. Civ. App.—Dallas 1979, writ granted) (court denied recovery under TDTPA when damages sought were same as provided for by party's insurance contract). *See generally* Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices —Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 2 (1979); *Senate Bill 357-Legislative Intent*, § 1, at 2 (1979) (unpublished legislative report, available from Sen. Bill Meier's Office, Capitol Station, Austin, Texas) (section 17.43, Cumulative Remedies, amended to prevent possible "stacking of damages on damages" of overlapping consumer laws).

59. *See Hearing on H.B. 744*, *supra* note 3, at 16. Representative Danny Hill, in his introductory remarks, noted that section 17.43 does not preclude violations of other laws from also being a violation of the TDTPA; however, the existence of an actual violation of another law will not be considered prima facie evidence that the act is an illegal deceptive trade practice. *Hearing on H.B. 744*, *supra* note 3, at 16.

60. *See* TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 1980).

61. *See* Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices —Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 3-4 (1979). *Compare* TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1980) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.46, at 323-24.

62. *Compare* TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1980) ("omnibus clause" actionable only by Consumer Protection Division) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, §§ 17.46(a), 17.50, at 323, 326 ("omnibus clause" actionable by private consumers). *See generally* Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 3-4 (1979); O'Gorman, *Omnibus Clause and Settlement Procedure*, *supra* note 6, at 2 (consumer denied use of "omnibus clause").

63. *Compare* TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Vernon Supp. 1980) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.46(c), at 324. *See generally* *Hearing on S.B. 357*, *supra* note 3, at 9-10.

clause," the Attorney General remains unfettered by the constraints of the "laundry list";⁶⁴ consequently, the Attorney General may seek an injunction against any practice having the "tendency or capacity to deceive."⁶⁵

The Act, as amended, limits a private cause of action to redress specific violations of the "laundry list,"⁶⁶ breach of warranty, and unconscionable actions.⁶⁷ Consequently, a consumer can no longer maintain a private cause of action under the "omnibus clause."⁶⁸ Restricting the meaning of "deceptive practices" to the twenty-three specific practices enumerated in the "laundry list" is not the only limitation with regard to private causes of action.⁶⁹ When construing the provisions of the TDTPA in private suits, Texas courts are no longer required to make mandatory use of federal interpretations of the meaning of "deceptive practices" under the FTCA.⁷⁰ Texas courts may, however, make discretionary use of "relevant and pertinent" opinions rendered in other jurisdictions, not necessarily federal.⁷¹ Significantly, both proponents and opponents to S.B. 357 believe the limitations placed upon private causes of action may not ad-

64. See TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 1980).

65. See *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975); *Bourland v. State*, 528 S.W.2d 350, 355 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

66. See TEX. BUS. & COM. CODE ANN. §§ 17.46(b), 17.50(a) (Vernon Supp. 1980). Subsection (d) of section 17.46 provides that, for the purposes of relief authorized individual consumers under section 17.50(a)(1), as amended in 1979, the term "false, misleading, or deceptive acts" is limited to those items enumerated on the "laundry list." *Id.* § 17.46(d).

67. See *id.* § 17.50(a)(2), (3).

68. See *id.* § 17.46(a), (d).

69. See *id.* § 17.46(c).

70. Compare *id.* § 17.46(c)(1) (use of FTCA interpretations mandatory only in suits brought by Attorney General) and *id.* § 17.46(c)(2) (courts may consider pertinent opinions from other jurisdictions) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.46(c), at 324 (use of FTCA interpretations mandatory in all cases).

71. See TEX. BUS. & COM. CODE ANN. § 17.46(c)(2) (Vernon Supp. 1980). In a private cause of action arising after August 27, 1979, the most "relevant and pertinent" decisions available to Texas courts construing the meaning of the term "false, misleading, or deceptive acts or practices" will be opinions from other jurisdictions interpreting the "laundry lists" of other states and not federal interpretations of the FTCA. The FTCA, 15 U.S.C. 45(a)(1) (1976), proscribes unfair or deceptive trade practices in its "omnibus clause." Due to the express language of subsection (d) of section 17.46 limiting the definition of "false, misleading, or deceptive acts or practices" to the specific practices enumerated in subsection (b) of section 17.46, judicial interpretations of the FTCA's definition of "unfair or deceptive acts or practices" are no longer truly "relevant and pertinent." See TEX. BUS. & COM. CODE ANN. § 17.46(b), (d) (Vernon Supp. 1980). *But cf.* Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 4-5 (1979) (FTCA to be used as precedent in private actions).

versely affect consumers.⁷² This optimism is based upon several "laundry list" items considered capable of interpretations broad enough to cover any consumer complaint.⁷³

The "laundry list" restricts the deceptive practices actionable by a consumer,⁷⁴ and unless the provisions of the "laundry list" are broadly interpreted, human ingenuity will find ways to circumvent the basic intent of the TDTPA.⁷⁵ The responsibility for developing "broad interpretations"

72. Cf. *Hearing on H.B. 744*, *supra* note 3, at 24 (90 percent of private TDTPA cases actionable under three or four of "laundry list" items); State Bar of Texas, *Consumer Law: Changes in the Deceptive Trade Practices Act by the 1979 Legislature* 1, 9-10 (1979) (unpublished script available from the Consumer Law Video Services Division of the State Bar of Texas) (several of "laundry list" items are broad) [Hereinafter cited as *Changes in the Deceptive Trade Practices Act*]. But cf. O'Gorman, *Omnibus Clause and Settlement Procedure*, *supra* note 6, at 2 (deceptive practice not on "laundry list" must be so prevalent or harsh that public policy demands it be actionable). See also Doggett, "How Much Does It Hurt?", *supra* note 8, at 1 (S.B. 357 resolved "actual damages" ambiguities beneficial to consumer); Doggett, *Damages from Deception*, *supra* note 7, at 1 (ambiguities resolved in favor of consumer by S.B. 357).

73. See TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon Supp. 1980). Section 17.46(b) recites in pertinent parts:

(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;

.....
(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;

.....
(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;

.....
(23) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

Id.

74. See *id.* §§ 17.46(d), 17.50(a)(1); Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 3-4 (1979); cf. Rothschild, *A Guide to Georgia's Fair Business Practices Act of 1975*, 10 GA. L. REV. 917, 935 (1976). By using a general prohibition against "unfair and deceptive" practices the Georgia Legislature insured the ability of the Georgia Act "to prevent the latest fraudulent schemes without need for annual revision" of its "laundry list." *Id.* at 934-35. See generally *Senate Debate of 10 April 79*, *supra* note 6, at 3-4 (though deceptive, practices not appearing on list are non-actionable).

75. See *Senate Debate of 10 April 79*, *supra* note 6, at 3-4. The United States Supreme Court has long recognized "[i]t is impossible to frame definitions which will embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 312 n.2 (1934). See also

to assure consumer protection rests upon the courts.⁷⁶ Texas courts construing these specific practices should be cognizant of the fact the "laundry list" contains the only deceptive practices capable of serving as the basis for a private cause of action under the TDTPA.⁷⁷ Failure of courts to construe the "laundry list" broadly will create the need for an annual revision of the "list" by the legislature to keep the TDTPA abreast of new deceptive techniques.⁷⁸

C. Relief for Consumers

1. *Consumer Remedies.* In order to recover damages an injured consumer must allege a violation within the "laundry list," a breach of implied or express warranty, or an unconscionable act.⁷⁹ The consumer must also prove the challenged act or practice was a "producing cause" of the actual damages suffered.⁸⁰ This is significant because under the original TDTPA an aggrieved consumer was only required to demonstrate he had been "adversely affected" by the alleged deceptive practice to recover damages.⁸¹

Rothschild, *A Guide to Georgia's Fair Business Practices Act of 1975*, 10 GA. L. REV. 917, 935 (1976).

76. The 1979 amendments to the TDTPA became effective August 27, 1979. See 1979 Tex. Gen. Laws, ch. 603, § 10, at 1332.

77. See note 74 *supra*.

78. See *Senate Debate of 10 April 79*, *supra* note 6, at 3-4; O'Gorman, *Omnibus Clause and Settlement Procedure*, *supra* note 6, at 2. See also *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 312 n.2 (1934); Rothschild, *A Guide to Georgia's Fair Business Practices Act of 1975*, 10 GA. L. REV. 917, 935 (1976).

79. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1980). This situation is similar to one that developed at common law, where a plaintiff was required to conform his complaint to one of the established forms of action (writs), or else find himself without an ordinary legal remedy. See 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 21, at 28-30 (5th ed. 1941). This problem was solved by the development of the Court of Chancery (Equity Courts). See *id.* § 1, at 1-2. Compare *Hearing on H.B. 744*, *supra* note 3, at 24 (TDTPA's "laundry list" broad enough to encompass any potential deceptive practice) with *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 312 n.2 (1934) (human inventiveness renders most complete list of deceptive practices automatically obsolete) and *Senate Debate of 10 April 79*, *supra* note 6, at 3-4 (if not in the "laundry list" an act is non-actionable, though deceptive) and O'Gorman, *Omnibus Clause and Settlement Procedure*, *supra* note 6, at 2 (TDTPA prohibits only specific actions listed).

80. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1980); Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 10 (1979).

81. See 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(a), at 326; Longley, *Consumer Protection*, *supra* note 19, at 27. But see D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 8.03, at 180-81 (1978); Bragg, *Special Issues in Deceptive Trade Practices Cases*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.C at 8 (1979).

The term "producing cause" is not defined in the TDTPA.⁸² The Texas Supreme Court in *Great American Indemnity Co. v. Sams*⁸³ stated the term "producing cause" has been held to be a non-legal term, therefore, one not requiring a legal definition.⁸⁴ According to the court, "producing cause" was to be given its "usual and ordinary meaning."⁸⁵ In its normal usage a "producing cause" is an act or omission creating or producing some effect.⁸⁶ In recent years the definition, developed in products liability and workmen's compensation cases, has required the act be the *sine qua non* of the injury, or in other words, that without which the injury would not have occurred.⁸⁷ Thus, the adoption of "producing cause" by the legislature,⁸⁸ as the legal standard of causation will require the consumer to prove the alleged deceptive practice was the "causation in fact" of his injuries.⁸⁹ With the adoption of this standard the greatest obstacle

82. See generally TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980); Bragg, *Special Issues in Deceptive Trade Practices Cases*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.C at 8 (1979).

83. 142 Tex. 121, 176 S.W.2d 312 (1943).

84. See *id.* at 124, 176 S.W.2d at 314.

85. See *id.* at 124, 176 S.W.2d at 314; *Texas & P. Ry. v. Short*, 62 S.W.2d 995, 998 (Tex. Civ. App.—Eastland 1933, writ ref'd n.r.e.).

86. See *Texas & P. Ry. v. Short*, 62 S.W.2d 995, 998 (Tex. Civ. App.—Eastland 1933, writ ref'd n.r.e.); cf. *Great Am. Indem. Co. v. Sams*, 142 Tex. 121, 124, 176 S.W.2d 312, 314 (1943) (tacitly approving conclusions of *Short* court).

87. See *Rourke v. Garza*, 530 S.W.2d 794, 798, 801 (Tex. 1975) (products liability); *Ruddell v. Charter Oak Fire Ins. Co.*, 482 S.W.2d 382, 385 n.2 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (workmen's compensation case). In *Rourke v. Garza* "producing cause" was defined as an "efficient, exciting, or contributing cause, which, in a natural sequence, produced injuries or damages complained of, if any." *Rourke v. Garza*, 530 S.W.2d 794, 798, 801 (Tex. 1975). In *Ruddell* the court defined the term to mean "an injury or condition which, either independently or together with one or more other injuries or conditions, results in incapacity, and without which such incapacity would not have occurred when it did." *Ruddell v. Charter Oak Fire Ins. Co.*, 482 S.W.2d 382, 385 n.2 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.).

88. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1980).

89. See Doggett, "How Much Does It Hurt?", *supra* note 8, at 4 ("[T]he question to be submitted to a jury is now clearly that of causation in fact . . ."). See generally D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 8.03, at 180-82 (1978); Bragg, *Special Issues in Deceptive Trade Practices Cases*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.C at 8 (1979); Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices — Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 10-11 (1979); Comment, *Measure of Damages for Misrepresentations Under the Texas Deceptive Trade Practices Act*, 29 BAYLOR L. REV. 135, 135-36 (1977). When a defendant's action did not result in a loss to the plaintiff, there could be no recovery of damages. See *Booth v. Coward*, 265 S.W. 1026, 1027 (Tex. Comm'n App. 1924, judgment adopted); *Garner-Evans & Co. v. Webber*, 363 S.W.2d 383, 384 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.); cf. *Pridgen v. Giles*, 267 S.W.2d 187, 190 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.) (no recovery when plaintiff

facing an injured consumer will be to conform his complaint to one of the authorized actionable categories enumerated in the TDTPA.⁹⁰ Once the consumer establishes a cause of action and proves he has sustained actual damages as a result of the seller's deceptive act or practice, he will be awarded appropriate relief under the TDTPA.⁹¹

2. *Damages Recoverable and Other Relief.* In light of the legislative history of the 1979 TDTPA amendments and recent case law, "actual damages" recoverable under the Act appear to include both economic and noneconomic loss.⁹² Consequential damages, such as mental anguish,

suffered no injury).

90. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1980).

91. See *id.* § 17.50(b).

92. See Maxwell, *1979 Amendments to the Texas Deceptive Trade Practices — Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 8 (1979) (citing partial transcript of House Debate on H.B. 744 (May 10, 1979)). Quoting in pertinent part:

Rep. Gibson: Would it . . . include . . . any damages that were incurred by the plaintiff such as mental anguish?

Rep. Hill: . . . *It would include any damages that you could convince the jury had occurred as a result of the violation of the Deceptive Trade Practices Act.*

Rep. Gibson: . . . So, in other words, any damages involving mental anguish, any damages that were consequential from (tortious) act of the defendant would be included in your amendment, is that correct?

Rep. Hill: That's correct.

Id. (emphasis added). Compare Engrossed version of S.B. 357 (version contained definition of "actual damages," § 17.45(10), which excluded recovery for mental anguish under TDTPA) with TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1980) (definition of "actual damages" contained in engrossed version of S.B. 357 deleted). Prior to the 1979 revision of the TDTPA, there was case law suggesting the availability of damages for both economic and noneconomic loss under the Act. See *Dennis Weaver Chevrolet, Inc. v. Chadwick*, 575 S.W.2d 619, 621-23 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.) (damages for mental anguish recoverable under certain circumstances); *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (plaintiff entitled to greatest amount of damages alleged and proved). Under the 1979 revision of the TDTPA,

[r]ecover by consumers of all forms of damages is particularly justified by the weakening of the treble damage remedy. Since there is no longer the possibility that a substantial mental anguish award by the jury will, unknown to it, be trebled by the Court, no reason exists to deny the consumer from being restored to whole.

Doggett, "How Much Does It Hurt?", *supra* note 8, at 3. *But cf.* *American Transfer & Storage Co. v. Brown*, 584 S.W.2d 284, 296-97 (Tex. Civ. App.—Dallas 1979, writ granted) (damages for mental anguish unavailable). The court ruled the absence of a definition of "actual damages" in the TDTPA or any other indication that "actual damages" included damages for mental anguish precluded the court from expanding the common law rules regarding the meaning of "actual damages." Therefore, damages for mental anguish were not allowed. *American Transfer & Storage Co. v. Brown*, 584 S.W.2d 284, 297 (Tex. Civ. App.—Dallas 1979, writ granted).

therefore, are recoverable under the TDTPA.⁹³ To recover consequential damages, however, a consumer must show the seller's conduct was the "producing cause" of those damages.⁹⁴ Upon fulfillment of these TDTPA requirements, the consumer will receive treble the amount of that portion of his actual damages not exceeding one thousand dollars.⁹⁵ In addition, the consumer will be entitled to an order enjoining the seller from engaging in deceptive practices or omissions in the future.⁹⁶ Furthermore, the consumer may obtain any restoration orders necessary to return the parties to their original positions,⁹⁷ as well as any other relief the court deems proper.⁹⁸ This unspecified ancillary relief available to a consumer includes the appointment of receivers or license revocation with any resultant costs assessed against the seller.⁹⁹

While the noneconomic forms of relief available to consumers are substantially unchanged from the original TDTPA,¹⁰⁰ provisions for the recovery of monetary damages have undergone significant alteration.¹⁰¹ A consumer who prevails in a cause of action arising after August 27, 1979, will not automatically recover treble the amount of his actual damages as required in *Woods*.¹⁰² Recovery of trebled damages is now limited to the first one thousand dollars of actual damages awarded,¹⁰³ unless the trier

93. See Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 7-9 (1979); Doggett, "How Much Does It Hurt?", *supra* note 8, at 1-4.

94. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1980). See generally Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 7-9 (1979); Doggett, "How Much Does It Hurt?", *supra* note 8, at 1-4; Longley, *Consumer Protection*, *supra* note 19, at 27-28; *Changes in the Deceptive Trade Practices Act*, *supra* note 72, at 2-3.

95. See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1980).

96. See *id.* § 17.50(b)(2).

97. See *id.* § 17.50(b)(3).

98. See *id.* § 17.50(b)(4).

99. See *id.* § 17.50(b)(4). The assessment of costs and fees against the seller under appropriate circumstances is new to the TDTPA. These assessments may have been included because not all actual damages awarded are mandatorily trebled under section 17.50(b)(1) of the revised TDTPA. See *id.* § 17.50(b)(1).

100. Compare *id.* § 17.50(b)(1) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(b)(1), at 327.

101. Compare TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1980) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(b)(1), at 327.

102. Compare *Woods v. Littleton*, 554 S.W.2d 662, 671 (Tex. 1977) (trebling of all actual damages mandatory) with TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1980) (only first one thousand dollars mandatorily trebled).

103. See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1980). The following examples illustrate a consumer's recovery when his actual damages are: 1) \$500 (or less

of fact determines the seller committed the illegal act "knowingly."¹⁰⁴ In the absence of a "knowing" violation, recovery of damages over one thousand dollars is limited to actual damages.¹⁰⁵ Moreover, the mere fact the seller acted "knowingly" will not automatically result in trebling the damages over the first one thousand dollars.¹⁰⁶ The consumer has no vested right to treble damages over the first one thousand; the award of up to three times the amount of the "excess" is discretionary with the trier of fact.¹⁰⁷ The Act is unclear, however, whether the discretionary award, if made, would be in addition to the actual "excess" mandatorily awarded to the consumer regardless of whether it is trebled.¹⁰⁸

than \$1000); 2) equal to \$1000; and 3) \$1500 (or more than \$1000). These examples presume the seller was *not* found to have committed the deceptive act "knowingly."

- 1) actual damages less than \$1000
 \$ 500 = actual damages sustained
 + \$1000 = 2 × \$500 (*See id.* § 17.50(b)(1))
 \$1500 = TOTAL AMOUNT RECOVERED
- 2) actual damages equal to \$1000
 \$1000 = actual damages sustained
 + \$2000 = 2 × \$1000 (*See id.* § 17.50(b)(1))
 \$3000 = TOTAL AMOUNT RECOVERED
- 3) actual damages greater than \$1000
 \$1500 = actual damages sustained
 + \$2000 = 2 × \$1000 (*See id.* § 17.50(b)(1))
 \$3500 = TOTAL AMOUNT RECOVERED

See generally Bragg, *Special Issues in Deceptive Trade Practices Cases* in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.C at 17-19 (1979); Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 6-7 (1979); Boyle, *Elements of Proof and Breach of Warranties*, *supra* note 10, at 5; Doggett, "How Much Does It Hurt?", *supra* note 8, at 4.

104. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1980). Section 17.50(b)(1) allows for the recovery of up to three times the amount of actual damages exceeding one thousand dollars when the defendant's actions are found to have been committed "knowingly." *Id.*; *see id.* § 17.45(9). Section 17.45(9) recites: " 'Knowingly' means actual awareness of falsity, deception, or unfairness of the act . . . giving rise to the consumer's claim . . . , but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." *Id.* § 17.45(9).

105. *See id.* § 17.50(b)(1).

106. *See id.* § 17.50(b)(1).

107. *See id.* § 17.50(b)(1). The term "excess" means the amount of actual damages over one thousand dollars awarded a prevailing consumer under section 17.50(b)(1). *Id.* § 17.50(b)(1).

108. *See id.* § 17.50(b)(1). Any discretionary enlargement of the "excess" by the court should be awarded in addition to the actual "excess" mandatorily recovered, since the con-

Nevertheless, this change in the statute settles the question of legislative intent regarding mandatory trebling of damages.¹⁰⁹ By requiring proof of intent or knowledge as a prerequisite to escalating the amount of damages awarded in excess of one thousand dollars, the amended TDTPA should serve to protect an unwitting seller from being assessed punitive damages.¹¹⁰ Though not as harsh as its predecessor, the Act should still help to eradicate fraud in the marketplace.¹¹¹

D. Consumer's Attorneys' Fees and Court Costs

Prior to 1979, the language providing for the mandatory award of attorneys' fees and court costs to a prevailing consumer was located in the same subsection as the treble damages provision.¹¹² A consumer was allowed to recover "reasonable" attorneys' fees.¹¹³ The 1979 amendments, however, create a distinct subsection for attorneys' fees and court costs,¹¹⁴ and require the consumer show the amount claimed is "reasonable and necessary" in light of the attendant circumstances.¹¹⁵ The burden of proof amendment was added to insure hours billed are not excessive.¹¹⁶ Further, the mandatory language "shall be awarded" was added to the sub-

sumer would have sustained the onerous burden of proving the seller acted intentionally. See *Woods v. Littleton*, 554 S.W.2d 662, 669 (Tex. 1977) (TDTPA to deter unscrupulous sellers); *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (plaintiff entitled to greatest amount of damages alleged and proved); TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1980) (TDTPA construed liberally to protect consumers and provide efficient procedures to secure protection). *But cf.* *Singleton v. Pennington*, 568 S.W.2d 367, 372 (Tex. Civ. App.—Dallas 1977, writ granted) (treble damages are Draconian). See also Boyle, *Elements of Proof and Breach of Warranty*, *supra* note 10, at 5, 10.

109. See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1980).

110. See *Hearing on H.B. 744*, *supra* note 3, at 7-8; *Hearing on S.B. 357*, *supra* note 3, at 1-3, 6, 37-38.

111. See D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 8.01, at 176-77 (1978); Hill, *Foreword to D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION v* (1978); *Senate Debate of 10 April 79*, *supra* note 6, at 15-16.

112. See *Woods v. Littleton*, 554 S.W.2d 662, 669 (Tex. 1977) (consumer's effective relief provided by provision for treble damages, attorneys' fees and court costs).

113. See 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(b)(1), at 327.

114. Compare TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon Supp. 1980) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(b)(1), at 327.

115. See TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon Supp. 1980); Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.A at 11 (1979); Doggett, "How Much Does It Hurt?", *supra* note 8, at 7 (citing Senate floor debate on all amendments of S.B. 357, at 24 (Apr. 10, 1979)).

116. See Doggett, "How Much Does It Hurt?", *supra* note 8, at 7 (citing Senate floor debate on all amendments of S.B. 357, at 24 (Apr. 10, 1979)).

section.¹¹⁷ Although attorneys' fees are mandatorily recoverable under the revised TDTPA,¹¹⁸ the amount recoverable is a question of fact.¹¹⁹

The consumer's burden of proof for recovery of attorneys' fees may be eased by articles 2226 and 3737h of the Texas Revised Civil Statutes, as amended by the Sixty-sixth Texas Legislature.¹²⁰ Article 2226 allows the court discretion to take judicial notice of the reasonableness of usual and customary attorneys' fees charged in certain instances.¹²¹ Article 3737h permits the court to consider an affidavit prepared by a party or his attorney reciting the reasonable and necessary nature of the amount billed as sufficient evidence to show the necessity of the hours billed.¹²²

E. Seller's Attorneys' Fees and Court Costs

In an attempt to discourage unfounded or harassing suits by consumers, the legislature amended the TDTPA's provision for attorneys' fees and court costs recoverable by a seller.¹²³ This subsection requires the court *mandatorily* award attorneys' fees and court costs to a seller when the consumer's suit is brought in bad faith or for purposes of harassment.¹²⁴ This amendment may discourage a consumer from pursuing litigation if the seller tenders a reasonable settlement offer or if the consumer's injuries are relatively minor with negligible tangible manifestations. Under such circumstances, if a consumer were to pursue litigation he might be found guilty of acting in "bad faith," and find his recovery off-set by the seller's cost of defending himself.¹²⁵ Although mandatorily

117. See TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon Supp. 1980). Compare *id.* § 17.50 with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50, at 326.

118. See TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon Supp. 1980).

119. See *International Security Life Ins. Co. v. Spray*, 468 S.W.2d 347, 349 (Tex. 1977); *Volkswagen of America, Inc. v. Licht*, 544 S.W.2d 442, 445-46 (Tex. Civ. App.—El Paso 1976, no writ). See generally Bragg, *Special Issues in Deceptive Trade Practices Cases*, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS, Ch.C at 19, 20 (1979); Johns, *1979 Amendments to the Consumer Protection Act and Their Effect on Defenses, Attorney Fees, Limitations and Venue* 11-13 (1979) (unpublished essay available from the State Bar of Texas) [Hereinafter cited as Johns, *1979 Amendments and Their Effect*].

120. See TEX. REV. CIV. STAT. ANN. arts. 2226, 3737h (Vernon Supp. 1980).

121. See *id.* art. 2226.

122. See *id.* art. 3737h.

123. See TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1980).

124. Compare *id.* § 17.50(c) with 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(c), at 327.

125. See TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1980); *cf.*, e.g., FLA. STAT. ANN. § 501.211(3) (West Supp. 1979) (consumer pursuing litigation may be required to post bond in amount of defendant's costs to be forfeited if suit found to be frivolous or harassing); GA. CODE ANN. § 106-1210(d) (Supp. 1979) (seller awarded attorneys' fees and costs if consumer in bad faith rejects settlement offer and continues suit); N.M. STAT. ANN. § 49-15-8(B)(1) (Supp. 1975) (prevailing seller recovers attorneys' fees and costs if con-

awarded when a consumer is found to be in "bad faith,"¹²⁶ the seller's attorneys' fees must still be substantiated by the seller as being "reasonable and necessary" in light of the attendant circumstances.¹²⁷

F. Notice: Offer of Settlement

The original TDTPA required an injured consumer give an intended defendant notice of his complaint at least thirty days prior to the commencement of the suit.¹²⁸ Although notice was a prerequisite to filing a suit,¹²⁹ the requirement was relatively unenforceable and ineffective.¹³⁰ Hence, the notice requirement was repealed in 1977¹³¹ and replaced by an affirmative defense to exemplary damages.¹³² When a seller could prove he had not received any written notice prior to the filing of the suit, the consumer's recovery was limited to his actual damages.¹³³ This defense to treble damages encouraged consumers to comply with the "letter of the law" and give notice. The defense provided little incentive, however, to resolve the consumer's grievance outside the courtroom.¹³⁴ The "notice" provision merely required written notice prior to commencement of the suit¹³⁵ by serving the defendant seller with the consumer's petition,¹³⁶ leaving the seller with little opportunity to make any attempt at conciliation.¹³⁷

The notice provision was further amended in 1979 when the Sixty-sixth Texas Legislature enacted a new "notice" section entitled "Notice: Offer of Settlement."¹³⁸ Written notice is now an unconditional prerequisite to filing an action under the TDTPA.¹³⁹ In the absence of a bona fide exception, failure to comply with the requirements of this section will bar any

sumer's suit brought without merit). See generally Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 748-49 (1972); Rothschild, *A Guide to Georgia's Fair Business Practices Act of 1975*, 10 GA. L. REV. 917, 925 (1976).

126. See TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1980).

127. See *id.* § 17.50(c).

128. See 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.53, at 330.

129. See *id.*

130. See generally *Hearing on S.B. 357*, *supra* note 3, at 5-6; see also 1977 Tex. Gen. Laws, ch. 216, sec. 12, at 605.

131. See 1977 Tex. Gen. Laws, ch. 216, sec. 12, at 605. See generally *Hearing on S.B. 357*, *supra* note 3, at 5-6.

132. See 1977 Tex. Gen. Laws, ch. 216, sec. 6, § 17.50A, at 604.

133. See *id.*

134. See *Hearing on S.B. 357*, *supra* note 3, at 5-6.

135. See 1977 Tex. Gen. Laws, ch. 216, sec. 6, § 17.50A(2), at 604.

136. See *id.*

137. See *Hearing on S.B. 357*, *supra* note 3, at 5-6.

138. See TEX. BUS. & COM. CODE ANN. § 17.50A (Vernon Supp. 1980).

139. See *id.* § 17.50A(a).

recovery under the Act.¹⁴⁰ The new notice section prescribes the manner in which a consumer must serve a prospective defendant with notice, and establishes a detailed procedure to be followed.¹⁴¹ Written notice¹⁴² advising the seller of the consumer's specific complaint¹⁴³ must be given at least thirty days prior to filing suit.¹⁴⁴ The notice must describe the amount of actual damages sustained by the consumer, as well as the amount of any attorneys' fees reasonably incurred in asserting the claim.¹⁴⁵ Compliance with these standards can be waived only if giving notice thirty days prior to filing suit would exceed the statute of limitations,¹⁴⁶ or if the consumer is merely asserting a counterclaim.¹⁴⁷ In effect the new notice section provides a detailed method for negotiation of consumer claims outside the courtroom¹⁴⁸ because the required notice provides an alleged wrongdoer with sufficient opportunity and information to decide whether to settle or to go to court. A seller is also provided with details about the type of injury sustained and the amount necessary to make the consumer whole again.¹⁴⁹

Upon receipt of written notice the seller may, within thirty days, tender a written offer of settlement.¹⁵⁰ This offer must include an agreement to reimburse the consumer for any reasonable attorneys' fees incurred.¹⁵¹ The offer, however, does not have to equal the amount demanded by or deemed reasonable by the consumer.¹⁵² If the consumer's demand is reasonable it would be to the seller's advantage in most cases to tender a comparable settlement offer. By offering the consumer substantially what he demanded, the seller may achieve an out of court settlement, thereby avoiding any treble damage assessments. Even if a settlement is not reached, the seller has demonstrated his good faith for purposes of any subsequent litigation.

Failure of the consumer to respond within thirty days constitutes a re-

140. *See id.* § 17.50A(a).

141. *See id.* § 17.50A.

142. *See id.* § 17.50A.

143. *See id.* § 17.50A(a).

144. *See id.* § 17.50A(a).

145. *See id.* § 17.50A(a).

146. *See id.* § 17.50A(b).

147. *See id.* § 17.50A(b).

148. *See Senate Bill 357—Legislative Intent 1, 3 (1979)* (unpublished transcript on file with Sen. Bill Meier's Office, Capitol Station, Austin, Texas) (sections "B" and "5" set out pertinent legislative intent of S.B. 357); O'Gorman, *Omnibus Clause and Settlement Procedure*, *supra* note 6, at 2.

149. *See TEX. BUS. & COM. CODE ANN.* § 17.50A(a) (Vernon Supp. 1980).

150. *See id.* § 17.50A(c).

151. *See id.* § 17.50A(c).

152. *See id.* § 17.50A(c).

jection¹⁵³ and may be filed with the court.¹⁵⁴ If the trier of fact finds the amount offered to be the same or substantially the same as the actual damages suffered, the court will limit the consumer's recovery to the lesser of his actual damages or the amount of the settlement offer.¹⁵⁵ It should be noted that under such circumstances a consumer probably would not be entitled to recover any attorneys' fees incurred subsequent to the rejection because they are not part of his actual damages.¹⁵⁶ A finding by a court favorable to the seller's offer constitutes a judicial determination of the offer's "reasonableness."¹⁵⁷ A consumer's continued pursuit of litigation after rejecting the offer may be viewed as harassment or bad faith.¹⁵⁸

These newly enacted procedures for notice and settlement give some bargaining power back to sellers accused of violating the TDTPA. By requiring compliance with this section as a prerequisite to filing a suit, the 1979 amendments may have given sellers sufficient leverage to encourage out of court settlements.¹⁵⁹ Achieving such settlements would serve to reduce overcrowded dockets, while allowing unwitting sellers to avoid harsh treble damages for unintentional mistakes. These settlements would also serve to make the injured consumer whole again, thereby fulfilling one of the primary goals of the TDTPA.

153. *See id.* § 17.50A(c).

154. *See id.* § 17.50A(d). The seller must file an affidavit with the court, accompanied by a copy of the settlement offer, certifying its rejection by the consumer. *Id.* § 17.50A(d).

155. *Id.* § 17.50A(d).

156. In 1979, the legislature specifically separated the recovery of actual damages and attorneys' fees. *See id.* § 17.50(b)(1), (d); *cf.* GA. CODE ANN. § 106-1210(d) (Supp. 1979) (court shall deny attorneys' fees incurred after properly tendered settlement offer rejected). *See also* Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 749 (1972); Rothschild, *A Guide To Georgia's Fair Business Practices Act of 1975*, 10 GA. L. REV. 917, 924-25 (1976).

157. *Cf.* TEX. BUS. & COM. CODE ANN. § 17.50A(e) (Vernon Supp. 1980) (evidence of settlement offer introduced *only* to determine its reasonableness).

158. *Compare id.* § 17.50(c) (seller awarded "reasonable and necessary" attorneys' fees if consumer's suit groundless or in bad faith) with FLA. STAT. ANN. § 501.211(3) (West Supp. 1979) (consumer pursuing litigation may be required to post bond in amount of defendant's costs, to be forfeited if suit found to be frivolous or harassing) and GA. CODE ANN. § 106-1210(d) (Supp. 1979) (seller awarded attorneys' fees and costs if consumer rejects settlement offer in bad faith and continues suit) and N.M. STAT. ANN. § 49-15-8(B)(1) (Supp. 1975) (prevailing seller recovers attorneys' fees and costs if consumer suit brought without merit). *See also* Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 749 (1972); Rothschild, *A Guide to Georgia's Fair Business Practices Act of 1975*, 10 GA. L. REV. 917, 925 (1976).

159. Out of court settlements are intended to allow an honest seller an opportunity to correct his error and make good the parties' bargain. *See Hearing on S.B. 357, supra* note 3, at 4-6.

G. *Defenses*

The "bona fide error" defense, limiting a consumer's recovery to actual damages, was eliminated by the 1979 amendments to the TDTPA.¹⁶⁰ The 1979 revision also repealed defenses made available to sellers who were neither given a reasonable opportunity to cure an alleged defect nor given any notice of the consumer's complaint prior to the suit.¹⁶¹ The repealed defenses are replaced by two affirmative defenses constituting absolute bars to any recovery of damages by the consumer:¹⁶² the "third party reliance" defense¹⁶³ and the "absolute tender" defense.¹⁶⁴

To assert the "third party reliance" defense successfully, a seller must prove he provided the consumer with written notice of his reliance upon written information from a third party.¹⁶⁵ This notice must have been given to the consumer before the sale was completed.¹⁶⁶ The seller also has the burden of proving the information relied upon by both parties was a "producing cause" of the consumer's injuries.¹⁶⁷ Finally, the seller must prove his reliance was, in fact, reasonable.¹⁶⁸ Establishing his own reliance is necessary because the mere fact the written information was a "producing cause" of the consumer's injuries will not automatically bar all possible recovery against the seller.¹⁶⁹ When a seller's conduct reveals he knew or should have known the information was inaccurate, the con-

160. Compare TEX. BUS. & COM. CODE ANN. § 17.50B (Vernon Supp. 1980) with 1977 Tex. Gen. Laws, ch. 216, sec. 6, § 17.50A(1), at 604.

161. Compare TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon Supp. 1980) with 1977 Tex. Gen. Laws, ch. 216, sec. 6, § 17.50A(1), (2), at 604.

162. See TEX. BUS. & COM. CODE ANN. § 17.50B (Vernon Supp. 1980).

163. See *id.* § 17.50B(a). "Third party reliance" means the seller was relying upon written information from the government or the product's manufacturer for the representations supplied to the buyer. *Id.* § 17.50B(a). See generally Johns, 1979 Amendments and Their Effect, *supra* note 119, at 1-2.

164. See TEX. BUS. & COM. CODE ANN. § 17.50B(d) (Vernon Supp. 1980). In *Baucum v. Great Am. Ins. Co.*, the Texas Supreme Court defined a valid tender to be "an unconditional offer . . . to pay . . . , in current coin of the realm, a sum not less . . . than [the amount] due on a specified debt or obligation." *Baucum v. Great Am. Ins. Co.*, 370 S.W.2d 863, 866 (Tex. 1963); see *Home Ins. Indem. Co. v. Gutierrez*, 409 S.W.2d 450, 454, 456 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.). The *Gutierrez* court ruled that payment by check is not a payment "in current coin of the realm." The court concluded: "[a]lthough the delivery to . . . [and] . . . acceptance by the creditor of the debtor's check is often treated, for convenience, as the passage of money, it is not payment." *Home Ins. Indem. Co. v. Gutierrez*, 409 S.W.2d 450, 456 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.).

165. See TEX. BUS. & COM. CODE ANN. § 17.50B(a) (Vernon Supp. 1980).

166. See *id.*

167. See *id.* § 17.50B(b).

168. See *id.* § 17.50B(a), (b).

169. See *id.* § 17.50B(b).

sumer will still be entitled to recover damages from the seller.¹⁷⁰

A second defense available to a seller is the "absolute tender" of damages demanded.¹⁷¹ To plead this defense successfully the seller must prove he tendered to the consumer the full amount of damages demanded within thirty days of receiving written notice of the complaint.¹⁷² The "tender" required is not a written tender of offer to settle; rather, it is an absolute tender in cash of the full amount of damages demanded.¹⁷³ The amount tendered must include any expenses claimed by the consumer, such as reasonable attorneys' fees incurred to assert the demand.¹⁷⁴ Proof of such a tender by the seller will bar any further legal remedies pursued by a consumer.¹⁷⁵

The TDTPA's new "damages" section¹⁷⁶ also allows filing of a suit against a third party who supplied a seller with false or inaccurate information when the third party knew or should have known the information would be provided to a consumer.¹⁷⁷ The consumer may maintain a third party suit because the Act specifically recites that "privity" is not a material issue.¹⁷⁸ The applicability of the remedy is more narrow in scope, however, than the actual defense itself.¹⁷⁹ The section expressly provides that the third party action is available in suits only when the "third party reliance" defense involves written information supplied by a non-govern-

170. *See id.* § 17.50B(a), (b).

171. *See id.* § 17.50B(d).

172. *See id.* § 17.50B(d).

173. *See id.* § 17.50B(d) (requiring cash tender of full amount demanded); *cf.* *Baucum v. Great Am. Ins. Co.*, 370 S.W.2d 863, 866 (Tex. 1963) (tender of full amount "in current coin of the realm" required). *Compare* TEX. BUS. & COM. CODE ANN. § 17.50A(c) (Vernon Supp. 1980) (tendering written offer of settlement sufficient) *with id.* § 17.50B(d) (cash tender of full amount required).

174. *See id.* § 17.50B(d).

175. *See id.* § 17.50B(d). Section 17.50B(d) is silent concerning the consequences that follow a consumer's rejection of the seller's attempted tender. The courts must now decide whether such a rejection would bar any further recovery by the consumer. When a consumer has rejected a tender of the amount he demanded, the court should limit the consumer's recovery to the lesser of the amount tendered or a reasonable amount as determined by the court. *Cf. id.* § 17.50A(d) (rejected reasonable settlement offer limits consumer's recovery to lesser of offer or amount found reasonable by court). Additionally, the court should award the defendant his "reasonable and necessary" attorneys' fees and court costs incurred in his defense after the consumer rejected seller's cash tender. *Cf. id.* § 17.50(c) (seller awarded fees and costs of defense if consumer's suit in "bad faith" or for harassment purposes).

176. *See id.* § 17.50B.

177. *See id.* § 17.50B(c).

178. *See id.* § 17.50B(c). Suit may be filed against the "third party" when a "third party reliance" defense has been raised, provided no double recovery is possible. *Id.* § 17.50B(c).

179. *Compare id.* § 17.50B(a)(1), (2), (3) *with id.* § 17.50B(c).

mental source.¹⁸⁰ A simple explanation for this limitation upon the subsection's application can be found in the doctrine of sovereign immunity,¹⁸¹ which precludes the commencement of any suit against a government body without its consent.¹⁸²

H. *Limitation and Venue*

The legislature also addressed the issues of a statute of limitations and venue when it revised the TDTPA. The idea of a specific statute of limitations for actions brought under the TDTPA is new to the Act.¹⁸³ Prior to 1979, the lack of an express statute of limitation required claimants look to Texas' two general statutes of limitation.¹⁸⁴ Depending upon whether the cause of action arose in tort or contract, the claimant would look to the two or four year general limitation statute.¹⁸⁵ Under the revised TDTPA, however, all causes of action must now be brought within two years of the occurrence of the deceptive act or practice.¹⁸⁶ In the case of a latent injury, the Act allows a cause of action to be brought within two years of the time the injury is discovered or should have been discovered through the exercise of reasonable diligence.¹⁸⁷

The major change to the TDTPA's venue section¹⁸⁸ is the deletion of a provision allowing a seller to be sued in any county in which the seller has conducted business in the past, regardless of whether he still conducts business in that county when suit is instituted.¹⁸⁹ A consumer may file suit in the county where the seller resides or maintains his principle place of business.¹⁹⁰ For causes of action arising after August 27, 1979, a consumer may sue a seller in any county in Texas in which the seller has a fixed and established place of business at the time the suit is instituted,¹⁹¹ or in the county the deceptive act or practice occurred or was solicited by

180. See *id.* § 17.50B(c).

181. Compare 28 U.S.C. § 2674 (1976) (Federal Tort Claims Act) with TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon 1970 & Supp. 1980) (Texas Tort Claims Act). See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970-78 (4th ed. 1971).

182. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 971 (4th ed. 1971).

183. Compare 1973 Tex. Gen. Laws, ch. 143, sec. 1, at 322 with TEX. BUS. & COM. CODE ANN. § 17.56A (Vernon Supp. 1980).

184. See TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1980) (actions to be commenced within two years); *id.* art. 5527 (actions barred in four years).

185. See *id.* arts. 5526, 5527.

186. See TEX. BUS. & COM. CODE ANN. § 17.56A (Vernon Supp. 1980).

187. See *id.*

188. See *id.* § 17.56.

189. Compare *id.* § 17.56 with 1977 Tex. Gen. Laws, ch. 216, sec. 8, § 17.56, at 604.

190. See TEX. BUS. & COM. CODE ANN. § 17.56 (Vernon Supp. 1980).

191. See *id.*

the seller or his authorized agent.¹⁹²

III. CONCLUSION

The purpose of the Texas Deceptive Trade Practices Act is to eliminate fraud in the Texas marketplace.¹⁹³ The Act is designed to protect Texas consumers, not to punish sellers who have committed only unintentional mistakes. The original TDTPA, although considered effective in deterring deceptive practices with its harsh treble damages, did not make a distinction between a seller's innocent error and his culpable misconduct.¹⁹⁴ As a result, the Act's punitive damages threatened both honest and dishonest sellers.

The key elements of the 1979 revisions are the new "absolute" defenses, stricter notice and settlement procedures, and limitations upon a seller's liability.¹⁹⁵ The interpretations given to these protective mechanisms by Texas courts will determine whether the Act's purpose and the legislature's intent in making the revisions will be fulfilled. The legislature's intention in enacting the 1979 amendments neither inhibits a consumer's ability to recover compensatory damages,¹⁹⁶ nor detracts from the rights and remedies afforded Texas consumers against unscrupulous members of the marketplace.¹⁹⁷

Unquestionably the new Texas Deceptive Trade Practices Act provides greater protection for honest sellers. The Act is, however, fundamentally a consumer protection act and should be liberally construed in favor of injured consumers. The protection provided honest sellers is affirmative in nature and should be afforded only sellers who have demonstrated their conduct was unintentional. The courts, therefore, should be reserved in the manner in which they extend this protection.

When construing the Texas Deceptive Trade Practices Act, the welfare of the injured consumer should be the court's primary concern. The fact a seller is blameless in his conduct neither absolves him of the guilt for having caused the consumer's injury, nor removes his obligation to make the consumer whole again. The consumer is the injured party, regardless of whether the seller acted intentionally or mistakenly. The consumer, therefore, must be afforded the greatest protection under the Act by the

192. *See id.*

193. *See id.* § 17.44.

194. *See Woods v. Littleton*, 554 S.W.2d 662, 671 (Tex. 1977); 1973 Tex. Gen. Laws, ch. 143, sec. 1, § 17.50(b)(1), at 326.

195. *See TEX. BUS. & COM. CODE ANN.* §§ 17.50(b)(1), 17.50A, 17.50B (Vernon Supp. 1980).

196. *See id.* § 17.50(b)(1).

197. *See id.* § 17.50(b)(1).

courts. The protections made available to a seller by the 1979 amendments to the Texas Deceptive Trade Practices Act must be kept in proper perspective. Failure to maintain such a perspective will create an imbalance in the Act that could defeat its fundamental purpose. A misinterpretation of the Act's purpose would render the Texas Deceptive Trade Practices Act a "Consumer Destruction" rather than a "Consumer Protection" act.¹⁹⁸

198. *Cf. Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (concept of fairness discussed). Justice Cardozo stated: "[b]ut justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Id.* at 122.