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A CONSUMER UPDATE: RECENT DEVELOPMENTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES ACT

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There is a company that paints the Golden Gate Bridge. That is all they do; once they finish, it already needs repainting. Discussing recent developments under the Texas Deceptive Trade Practices Act is a similar task. Once you have gathered up the most recent developments and think you understand them, new cases immediately appear which add to or alter what you have just concluded.

With this preface, the following is a discussion of some of the most recent developments under the DTPA.[1] Recognizing that due to the nature of law review publishing it is impossible to have the most-recent recent developments, we have chosen instead to deal with a definite period of time—September 1986 through September 1988. While every attempt has been made to include cases subsequent to that date whenever their inclusion was not precluded by publication deadlines, the authors make no representation that what we say may not have already been affected by a more recent development.[2]

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1. It should be noted that this discussion is designed for the practitioner with knowledge of the DTPA. For an excellent overview of the DTPA, see generally D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION (2d ed. 1983 & Annual Supps.). The leading DTPA cases are collected and discussed in R. ALDERMAN, TEXAS DECEPTIVE TRADE PRACTICES ACT (1988). *See also* Alderman, *Innovative Use of the Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 45 (1987); Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1 (1976); *Consumer Protection Symposium*, 8 ST. MARY'S L. REV. 609 (1977); Krahmer, McCormick & Lovell, *Banks and the Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 1 (1987). The State Bar of Texas holds an annual Professional Development Program concerning the DTPA. The materials published in connection with these programs are an up-to-date source of analytical and practical information.

2. It should be noted that this article has not attempted to deal with recent developments involving the DTPA and the Texas Insurance Code. This is not to imply that such developments are not significant. To the contrary, the recent trend toward increasing consumers' rights when dealing with insurance companies is believed too important to be briefly dealt with in an article of this type. *See generally* Kincaid, *End of the Line for Bad Faith Insurance Practices, 14* CAVEAT VENDOR 2 (1988). Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129 (Tex. 1988)(home insurance policy subject of unfair claims settlement suit); Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210 (Tex. 1988)(duty of good faith required of workers' compensation carriers); Employers Casualty Co. v. Block, 744 S.W.2d 940 (Tex. 1988)(homeowners and roofing contractor sue on insurance contract); Ranger County Mut. Ins. Co. v. Guin, 723 S.W.2d 656 (Tex. 1987)(insureds sue automobile insurer for negligent failure to settle lawsuit); Aetna Casualty and Sur. Co. v. Marshall, 724 S.W.2d 770 (Tex. 1987)(workers' compensation suit); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987)(motorcyclist sues insurer on uninsured motorist policy); Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641 (Tex. 1987)(fire insurer sued for unfair practices and breach of duty of good faith and fair dealing).

I. INTRODUCTION

Since its enactment in 1973, the Texas Deceptive Trade Practices—Consumer Protection Act[3] (hereinafter DTPA or the Act) has evolved into one of the most important weapons in the civil litigator's arsenal. Although the Act has been amended several times,[4] it is still safe to say that in Texas, most individuals and businesses are consumers, and all consumers are substantially protected by the DTPA.

A review of the litigation under the DTPA leads to several general observations. First, the Act's popularity has not diminished and, in fact, may be increasing if the number of appellate cases is such an indication. Second, the level of sophistication with which DTPA claims are being litigated appears to be rising as major issues are resolved and finer points of the Act are examined. Finally, many unresolved questions remain concerning the DTPA which the courts must answer before the Act achieves the level of certainty which is necessary for an efficient system of consumer protection. The following discussion will explore the most recent developments under the Act in light of this final point.

II. WHO IS A CONSUMER?

Section 17.44 provides that the DTPA "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers . . . ."[5] Since its enactment, the DTPA uniformly has been interpreted in a manner that affords the greatest recovery to the greatest number of people. A good example is the courts' application of

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3. TEX. BUS. & COM. CODE ANN. §§ 17.30-17.826 (Vernon 1987).

4. The DTPA was passed by the 63rd session of the legislature and became effective on May 21, 1973. Deceptive Trade Practices Act, ch. 143, 1973 Tex. Gen. Laws 322. The legislature has amended the Act in each of the legislative sections following its enactment. *See, e.g.*, Act of Apr. 24, 1975, ch. 62, 1975 Tex. Gen. Laws 149; Act of May 23, 1977, ch. 216, 1977 Tex. Gen. Laws 600; Act of June 13, 1979, ch. 603, 1979 Tex. Gen. Laws 1327; Act of June 8, 1981, ch. 307, 1981 Tex. Gen. Laws 863; Act of June 19, 1983, ch. 883, 1983 Tex. Gen. Laws 4943; Act of June 12, 1985, ch. 564, 1985 Tex. Gen. Laws 2165; Act of June 11, 1987, ch. 280, 1987 Tex. Gen. Laws 1641. The version discussed herein is as amended through the 1987 session. In determining the applicability of the Act, the general rule is that the date of the act or practice giving rise to the cause of action, not the date of the sale or date of discovery, controls. Woods v. Littleton, 554 S.W.2d 662, 666 (Tex. 1977). It is, therefore, important to determine which version of the Act controls to ensure that the correct version is used. For example, prior to 1983, the legislature amended the definition of "consumer" to exclude large corporations. An action could be brought today by a large corporation if the act or practice complained of occurred in 1982.

5. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987).

the Act's definition of "consumer."[6] This term has been liberally interpreted to include a broad range of plaintiffs through the elimination of privity. In general, once a person begins the process of buying or leasing goods or services, that person is a consumer and can maintain an action against anyone who violates the Act.[7] It does not matter if a transaction was ever consummated or who ultimately pays for the goods or services.[8]

A recent supreme court case demonstrates the application of DTPA "consumer" status. *Birchfield v. Texarkana Memorial Hospital*[9] involved an action brought as a result of medical treatment received by an infant, Kellie Birchfield.[10] Kellie, who was born premature, was administered roughly four hundred hours of oxygen without adequate supervision.[11] This occurred in spite of a report published three years earlier warning of the dangers of not closely monitoring arterial blood gases.[12] Kellie's parents, individually and as next friends of Kellie, sued the hospital and the three attending physicians.[13] The petition alleged negligence against all the defend-

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6. *See* TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon 1987)(definition of consumer). Section 17.50 of the Act provides that "a consumer" is the proper party to bring a DTPA action. Consumer is defined in section 17.45(4) to mean "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more." Thus, anyone except certain business consumers may sue under the DTPA. Business consumer is defined in section 17.45(10) to mean "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision or agency of this state."

7. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987)(defining what constitutes consumer).

8. *See* Sherman Simon Enter., Inc. v. Lorac Serv. Corp., 724 S.W.2d 13, 15 (Tex. 1987). "The language of section 17.45(4) clearly indicates that a claimant can be a consumer under the DTPA even if the transaction is not consummated since a consumer is defined as 'a *corporation* who *seeks* or acquires . . . by . . . lease, any goods . . . .' " *Id.* (emphasis in original). The courts continue to broadly define the terms "goods" or "services." *See generally* Archibald v. Act III Arabians, 755 S.W.2d 84, 86 (Tex. 1988)(horse an existing tangible good); Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873, 877 (Tex. App.—Corpus Christi 1988, writ denied)(franchise agreement a good or service); Bachyasky v. State, 747 S.W.2d 868, 868 (Tex. App.—Dallas 1988, writ denied)(DTPA applied to physician).

9. 747 S.W.2d 361 (Tex. 1987).

10. *Id.* at 364.

11. *Id.*

12. *Id.*

13. Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 364 (Tex. 1987).

ants and a DTPA claim against the hospital.[14] The DTPA claim was based on the hospital's misrepresentation that it was "adequately equipped to handle premature babies."[15]

The jury found in favor of the plaintiffs on both claims.[16] On appeal to the Texas Supreme Court, the hospital argued that a DTPA action could not be maintained on Kellie's behalf because she was not a "consumer."[17] The supreme court held that she was even though *she* did not contract to receive any services of the hospital.[18] "A plaintiff establishes her standing as a consumer in terms of her relationship to a transaction, not by a contractual relationship with the defendant."[19] In the instant case, Kellie Birchfield obviously "acquired" services by "purchase," even though she did not contract to receive them.[20]

Birchfield is important for two reasons. First, it emphasizes that a DTPA consumer need not be the one who pays for the services acquired. Second, the court permitted an action to be maintained even though the misrepresentation was actually made to the parents of the consumer. In essence, the court is saying that a DTPA claim exists whenever a consumer is damaged as a result of a misrepresentation, even if the misrepresentation is made to another.[21]

A recently resolved issue relating to the term consumer is who must bear the burden of proof regarding the business consumer exception. Section 17.45(4) of the DTPA excepts certain "business consumers" from the Act's protection. Excepted from the Act are those business consumers that have assets of $25 million or more or that are "owned or controlled by a corporation or entity with assets of $25 million or more."[22]

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14. *Id.*

15. *Id.* The jury found that the hospital "had violated the DTPA by holding out to the Birchfields that the hospital was adequately equipped to handle premature babies when it was not." *Id.*

16. *Id.*

17. Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 368 (Tex. 1987).

18. *Id.*

19. *Id.*

20. *Id.*; *see also* Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex. 1985)(acquiring services constitutes consumer).

21. *See* Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 368 (Tex. 1987). *But see* Taylor v. Burk, 722 S.W.2d 226, 228-29 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.)(seller's misrepresentation to first home buyer not basis for DTPA claim by subsequent buyer).

22. TEX. BUS. & COM. CODE ANN. § 17.45(4), (10) (Vernon 1987).

In *Eckman v. Centennial Savings Bank*,[23] Centennial Bank agreed to fund the plaintiffs' joint venture to build 160 apartment units.[24] After the plaintiffs' first draw, the bank decided to withdraw funding, saying the joint venture was unstable.[25] The joint venture brought suit for breach of contract and later amended its pleadings to include a claim under the DTPA.[26] The trial court granted a judgment notwithstanding the verdict for defendant Centennial Bank.[27] Plaintiffs appealed.[28]

The appellants contended that the bank had the burden of establishing as an affirmative defense that the plaintiffs were within the exception for certain business consumers.[29] The appeals court noted, however, that pleading and proving consumer status is one element of a cause of action under the DTPA.[30] Therefore, the court held that a plaintiff who sues as a business consumer has to prove both consumer and business consumer status.[31] The court did not consider any of the appellants' other points of error, stating that failure to establish consumer status was dispositive of the issue.[32] *Challenge Transportation, Inc. v. J-Gem Transportation, Inc.*,[33] on the other hand, held that the exception for certain business consumers must be proven by the defendant.[34]

Recently, the Texas Supreme Court reversed and remanded *Eckman*,[35] but did not fully agree with the approach taken in *Challenge Transport* either. The supreme court held that the trial court in *Eckman* improperly granted the judgment n.o.v. based on the plaintiffs' failure to plead and prove that their assets were less than $25 million. According to the supreme court, the burden is on the defendant to

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23. 742 S.W.2d 826 (Tex. App.—Dallas 1987), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 46 (Oct. 26, 1988).

24. *Id.* at 827.

25. *Id.*

26. *Id.*

27. Eckman v. Centennial Sav. Bank, 742 S.W.2d 826, 828 (Tex. App.—Dallas 1987), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 46 (Oct. 26, 1988).

28. *Id.*

29. *Id.*

30. *Id.*

31. Eckman v. Centennial Sav. Bank, 742 S.W.2d 826, 828 (Tex. App.—Dallas 1987), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 46 (Oct. 26, 1988).

32. *Id.*

33. 717 S.W.2d 115 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

34. *Id.* at 117.

35. Eckman v. Centennial Sav. Bank, 32 Tex. Sup. Ct. J. 46 (Oct. 26, 1988).

raise the issue of business consumer status but, once raised, the plaintiff has the burden to prove that the exception does not apply. The court noted that a defendant may only place business consumer status in issue "when there is a reasonable question over the plaintiff's status as a business consumer,"[36] on penalty of sanctions under the Texas Rules of Civil Procedure. The decision in *Eckman* appears to reach a balance between the rights of consumers and the rights of defendants *if* the courts judiciously apply its holding, rationale, and Rule 13 sanctions.

In addition to broadly defining consumer, the courts have continued the supreme court's trend established in *Flenniken v. Longview Bank & Trust Co.*[37] of viewing the transaction from the perspective of the consumer, rather than from the seller or lender.[38] As the court noted in *Flenniken*, a loan may qualify under the Act when the consumer sought not simply to borrow money, but rather to purchase a house.[39] Thus, whenever the underlying basis of the transaction is the purchase of goods or services, the collateral lending of money should be subject to the DTPA.[40] *Holland Mortgage and Investment Corp. v. Bone*[41] is representative of the continuation of the rationale of *Flenniken*. In *Holland Mortgage*, homeowners brought suit against the builder and the mortgagee under the DTPA seeking damages after the house flooded four times, allegedly because of defective construction.[42] The homeowners won a judgment of $33,000 against the defendants jointly and severally.[43]

On appeal, the appellant mortgage company argued that the "appellees did not seek or acquire goods and services from the appellant, and, therefore, were not consumers who could assert a cause of action under the DTPA."[44] Under section 17.45(4), a consumer is an individual who seeks or acquires goods or services.[45] Goods are defined

36. *Id.* at 49.

37. 661 S.W.2d 705 (Tex. 1983).

38. *See id.* at 706-07.

39. *Id.* at 708. *But see* Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 175 (Tex. 1980)(court held "mere extension of credit" not governed by DTPA).

40. *See Flenniken*, 661 S.W.2d at 707-08.

41. 751 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1987, no writ)(transaction viewed from consumer's perspective).

42. *Id.* at 516-17.

43. *Id.* at 516.

44. *Id.* at 517.

45. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).

as including "tangible chattels or real property purchased or leased for use."[46] Services include those furnished "in connection with the sale or repair of goods."[47] Because the objective of the appellees in borrowing money was to purchase the house, they were DTPA consumers.[48] The court distinguished *Riverside National Bank v. Lewis*,[49] which held a borrower was not a consumer,[50] noting that *Riverside* involved the mere extension of credit, unrelated to a specific acquisition.[51] The court concluded that there was enough evidence of a "tie-in relationship between the builder and the appellant" to find that the appellees were consumers with respect to all parties who sought to benefit from the sale.[52] Another recent decision held, however, that the mere purchase of a certificate of deposit is not sufficient to give rise to consumer status.[53]

Finally, one supreme court decision is more noteworthy for what it did not do than for what it did. In *E.F. Hutton and Co., Inc. v. Youngblood*,[54] the supreme court withdrew its earlier opinion which broadly held that because it is preempted by the Texas Securities Act, the DTPA did not apply to securities transactions.[55] In the substitute opinion, the court found that E.F. Hutton never presented this argument to the trial court, nor did it make the argument in the court of appeals until its second motion for rehearing and, therefore, any error was waived.[56] The following comment,[57] published immediately after the withdrawn opinion, indicates the importance of what the court ultimately chose not to do.

> The court's conclusion, that the DTPA does not apply when application would be inconsistent with the TSA is probably a correct application of these two laws, and general statutory interpretation. The court

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46. *Id.* § 17.45(1).

47. *Id.* § 17.45(2).

48. *See* Holland Mortgage and Inv. Corp. v. Bone, 751 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1987, no writ).

49. 603 S.W.2d 169 (Tex. 1980).

50. *Id.* at 174-76.

51. *See Holland*, 751 S.W.2d at 517-18.

52. *Id.* at 519.

53. *See* Grass v. Credito Mexicano, S.A., 797 F.2d 220, 222 (5th Cir. 1986). For a general discussion of the DTPA and banks, see Krahmer, Lovell & McCormick, *Banks and the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 1 (1987).

54. 741 S.W.2d 363 (Tex. 1987).

55. *Id.* at 364.

56. *See id.*

57. Editor's Comment, 12 CAVEAT VENDOR 94-95 (1987).

ignores, however, another basic tenet of statutory construction: that statutes should, whenever possible, be interpreted in a manner whereby they can both be applied consistently. In the instant case, a recognition that this transaction involved the rendering of a service, rather than the sale of securities, would permit application of the DTPA without resulting inconsistencies. Youngblood went to E.F. Hutton, a "Full Service Broker," and asked for and received investment and tax advice. It was this advice that forms the basis of their complaint, not the resulting sale of a security. The courts broad sweep of preemption authorizes anyone who deals in stocks and bonds to misrepresent the nature of their corollary services, subject to only negligence liability. Clearly, if an accountant or attorney had given the same advice to the Youngbloods, DTPA liability would lie. In future cases the court should pay careful attention to the transaction in question and ask: Was this the sale of securities or the rendering of an independent service? Only if the former should the DTPA be deemed incompatible and inapplicable.[58]

III. UNCONSCIONABILITY

In a 1985 decision, *Chastain v. Koonce*,[59] the Texas Supreme Court made it clear that unconscionability under the DTPA is an objective standard, determined by examining the whole transaction.[60] The intent of the defendant or degree of culpability is not at issue.[61] To establish unconscionability, it is only necessary that the consumer show that the defendant has either taken advantage of the consumer's lack of knowledge, ability, or capacity to a grossly unfair degree or entered into a transaction that "results in a gross disparity between the value received and the consideration paid."[62] The test under either standard is whether the conduct was "gross," a term *Chastain* defined to mean "glaringly noticeable, flagrant, complete and unmitigated."[63] The courts have continued to apply this test in considering unconscionability under the Act.[64]

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58. *Id.*

59. 700 S.W.2d 579 (Tex. 1985).

60. *Id.* at 583. "Section 17.45(5) is intended to be an objective standard. As the laundry list provisions of Section 17.46(b) demonstrate, the legislature knows how to include a scienter requirement when it so chooses." *Id.*

61. *Id.*

62. *Id.* at 582 (quoting TEX. BUS. & COM. CODE ANN. § 17.45(5)(b)).

63. *Id.* at 584. The court determined this to be the "ordinary meaning" of the word.

64. *See* Sun Power, Inc. v. Adams, 751 S.W.2d 689, 695 (Tex. App.—Fort Worth 1988, no writ)(seller falsely represented cash registers compatible with buyer's computer, seller never repaired broken printer, register ruined buyer's accounting procedure); Town East Ford

For example, in *Wyatt v. Petrila*,[65] the Wyatts sold their home for $625,000 to the Petrilas "as is" in September of 1983.[66] The Petrilas discovered that the roof leaked and that the air conditioning and heating systems did not function correctly.[67] Wyatt had not made his agent aware of these problems and the Petrilas alleged that the sale by Wyatt was unconscionable under section 17.45(5) of the Act.[68] At the trial, the jury had determined that the Petrilas had received a house worth $575,000, but they had paid $625,000 for it.[69] The trial court awarded the Petrilas substantial damages of $406,197.97.[70]

On appeal, the court pointed to several cases in which the disparity between consideration paid and value received were found to be unconscionable.[71] Usually, these cases involved receiving nothing for fully paid consideration.[72] Employing the definition of gross from *Chastain*, the court determined that the disparity of $50,000 in a

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Sales, Inc. v. Gray, 730 S.W.2d 796, 801 (Tex. App.—Dallas 1987, no writ)(unconscionable conduct of car salesman, supported by evidence showing seller denied buyer's demand to revoke purchase after numerous attempts to repair auto had failed); Bel-Go Assoc.-Mula Road v. Vitale, 723 S.W.2d 182, 189 (Tex. App.—Houston [1st Dist.] 1986, no writ)(post-sale inability to obtain building permit reducing value of land by 23% held not gross disparity); Mercedes-Benz of North Am. Inc. v. Dickenson, 720 S.W.2d 844, 850 (Tex. App.—Fort Worth 1986, no writ)(gross disparity shown by $8500 decrease in value of car); Chandler v. Householder, 722 S.W.2d 217, 218 (Tex. App.—Eastland 1986, writ ref'd n.r.e.)(mechanic's act of leaving car unlocked and unattended resulting in theft of car not unconscionable).

65. 752 S.W.2d 683 (Tex. App.—Corpus Christi 1988, no writ).

66. *Id.* at 684. Note that selling property "as is" does not preclude a finding of unconscionability under the Act. *See id.* at 685-86.

67. *Id.* at 684.

68. *Id.*

69. *Id.* at 686.

70. Wyatt v. Petrila, 752 S.W.2d 683, 685 (Tex. App.—Corpus Christi 1988, no writ).

71. *Id.* at 686.

72. *See* Miller v. Soliz, 648 S.W.2d 734, 739 (Tex. App.—Corpus Christi 1983, no writ)(gross disparity by operation of law because plaintiff paid consideration and received no value in return); Vick v. George, 671 S.W.2d 541, 550 (Tex. App.—San Antonio 1983)(evidence that buyers of gas lease shares received absolutely no return on investment and market value of well was negligible supported damage award for unconscionability), *rev'd in part on other grounds*, 686 S.W.2d 99 (Tex. 1984); Butler v. Joseph's Wine Shop, Inc., 633 S.W.2d 926, 931-32 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.)(evidence that defendant's manager negotiated conveyance of store fixtures to third party held sufficient to support jury's finding of gross disparity); Jim Walter Homes, Inc. v. White, 617 S.W.2d 767, 772 (Tex. Civ. App.—Beaumont 1981, no writ)($400 charged by contractor for compliance with fictitious building code held to be unconscionable dealing); Sam Kane Beef Processors, Inc. v. Manning, 601 S.W.2d 93, 95-96 (Tex. Civ. App.—Corpus Christi 1980, no writ)(gross disparity where meat contained excess water and virtually worthless, selling for $732.90).

transaction of $625,000 was not "gross" as a matter of law.[73]

Another recent unconscionability case is *Brown v. Galleria Area Ford, Inc.*[74] The Browns took their pick-up truck to Galleria Area Ford for repairs.[75] The truck had been severely damaged in an accident and the Ford dealership where they had purchased the truck six days earlier promised to repair the truck to pre-accident condition in three weeks.[76] The repairs were not carried out properly and the Browns filed suit.[77]

The supreme court applied the *Chastain* test to see if there was some evidence to support the trial court's judgment that the consumer's lack of knowledge was taken advantage of to a grossly unfair degree.[78] In this case, it was clear that there existed a gross disparity between value received and consideration paid by the plaintiffs.[79] In fact, expert testimony at trial established that the Browns received the truck in a condition which was dangerous to drive.[80] The court also found some evidence showing that the Browns were taken advantage of to an unfair degree.[81] Galleria Ford was in the midst of purchasing the dealership from LaMarque Ford while the repairs were taking place.[82] The trial court found that Galleria Ford took advantage to a grossly unfair degree of the Brown's lack of knowledge regarding the relationship and agreements between Galleria and LaMarque Ford.[83] Although the court of appeals found that because of their agreement relieving Galleria of any liability for deceptive trade practices perpetrated under LaMarque's name, Galleria could not be held liable, the Texas Supreme Court disagreed.[84] The supreme court held that because the main purpose of the Act is to protect the public from deceptive trade practices and because the trial jury found the Galleria Ford had engaged in an unconscionable act or course of action, Galleria

73. *See* Wyatt v. Petrila, 752 S.W.2d 683, 686 (Tex. App.—Corpus Christi 1988, no writ).
74. 752 S.W.2d 114 (Tex. 1988).
75. *Id.* at 114.
76. *Id.*
77. *Id.* at 115.
78. *Id.* at 116.
79. Brown v. Galleria Area Ford, Inc., 752 S.W.2d 114, 116 (Tex. 1988).
80. *Id.*
81. *Id.*
82. *Id.* at 115.
83. *Id.* at 114.
84. Brown v. Galleria Area Ford, Inc., 752 S.W.2d 114, 116-17 (Tex. 1988).

could be held liable.[85]

Another case where unconscionability was alleged is *Williams v. Trail Dust Steak House, Inc.*[86] Williams purchased a mobile home from appellees in 1982 for $30,055, with a $6,000 down payment.[87] Williams made her first payment in April of 1982, but ceased payments in August of that year because the mobile home was defective.[88] Appellees never repaired any of the numerous defects which she reported and she demanded the return of the money already paid.[89] The jury found that the appellees had sold the home to Williams in a defective condition, but also found that the seller's conduct was not unconscionable.[90] On appeal, Williams challenged the method the court used in submitting the issues of unconscionability to the jury.[91]

The court of appeals agreed with Williams and held that the trial court incorrectly informed the jury that to constitute unconscionability, the sale had to have been made knowingly.[92] The standard Williams had requested was that the defendant knew or should have known of the defects.[93] The appeals court, relying on *Chastain*, held that actual knowledge was not necessary for a finding of unconscionability and that the trial court had improperly conditioned its holding on actual knowledge.[94]

IV. THE LAUNDRY LIST

The laundry list continues to be the most popular and usually the easiest method of establishing a DTPA violation.[95] The most common laundry list violations are of subsections (5) and (7), the general

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85. *Id.* at 117.

86. 727 S.W.2d 812 (Tex. App.—Fort Worth 1987, no writ).

87. *Id.* at 813.

88. *Id.*

89. *Id.* at 813-14.

90. *Id.* at 814.

91. Williams v. Trail Dust Steak House, Inc., 727 S.W.2d 812, 814 (Tex. App.—Fort Worth 1987, no writ).

92. *Id.* at 815.

93. *Id.* Note that even the standard Williams requested is probably incorrect and higher than required. As the court noted in *Chastain*, knowledge, actual or implied, is not an element of DTPA unconscionability. *See* Chastain v. Koonce, 700 S.W.2d 579, 582 (Tex. 1985).

94. *See Williams*, 727 S.W.2d at 816.

95. TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987). (24 per se violations of DTPA). *See also* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 84 (2d ed. 1983).

misrepresentation provisions.[96] For example, a violation of the Act was recently found when a seller misrepresented the capacity of a restaurant to operate at a profit and that the buyer could operate it under the seller's permits and licenses.[97] A violation of several laundry list provisions, including subsection (5), was found when an anti-abortion group placed advertisements in the yellow pages under abortion services, but actually disseminated anti-abortion information.[98]

Misrepresentation may be made by the defendant directly, or indirectly through its salespeople or other representatives,[99] or in promotional literature or advertising. But the misrepresentation must be such as to be a producing cause of actual damages.[100] For example, in *Freeman v. Greenbriar Homes, Inc.*,[101] the court failed to find a violation of the Act when the conditional nature of the agreement was fully disclosed to the consumer.[102] Similarly, in *McGalliard v. Kuhlmann*,[103] mere opinion was held insufficient to establish a misrepresentation of a material fact and a violation of the laundry list.[104] While a distinction between a misrepresentation of fact and mere opinion is often difficult to establish, it is clear that only the former is actionable under the DTPA.[105]

A provision of the laundry list which appears to have gained increased popularity is subsection (23), the failure to disclose.[106] Under this subsection, a consumer has a claim when: (1) the defendant knew of information concerning the goods; (2) the information is material;

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96. *See* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 82, 84 (2d ed. 1983).

97. Rendon v. Sanchez, 737 S.W.2d 122, 125 (Tex. App.—San Antonio 1987, no writ).

98. Mother & Unborn Baby Care of N. Tex., Inc. v. State, 749 S.W.2d 533, 539 (Tex. App.—Fort Worth 1988, no writ). This case is also significant for its finding that the plaintiff was a DTPA consumer. *See id.* at 539-40.

99. Representatives may be responsible in their individual capacity. *See* Light v. Wilson, 663 S.W.2d 813, 814 (Tex. 1983); Dominguez v. Brackey Enter., Inc., 756 S.W.2d 788, 793 (Tex. App.—El Paso 1988, no writ). *But see* Walker v. Whitman, 759 S.W.2d 781, 783 (Tex. App.—Fort Worth 1988, no writ).

100. Post-transaction misrepresentations may be actionable under the DTPA if they are a producing cause of actual damages. *See* Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873, 880 (Tex. App.—Corpus Christi 1988, writ denied).

101. 715 S.W.2d 394 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

102. *Id.* at 396.

103. 722 S.W.2d 694 (Tex. 1986).

104. *Id.* at 697 (trial court found various DTPA violations).

105. *See* Presidio Enters., Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674, 678-79 (5th Cir. 1986)(discussion of distinction between opinion and fact).

106. *See* TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (Vernon 1987).

and (3) the information is negative.[107] For example, in *Kold-Serve Corp. v. Ward*,[108] a violation was found when the seller failed to disclose the extent of the prior use of an ice machine when it had been used as a "demonstrator."[109]

Subsection (23) has been interpreted to impose a duty to disclose in nearly all cases. The test for this provision is, however, whether the defendant knew or should have known the information which he failed to disclose, and whether he knew it would matter to the plaintiff. Thus, in *Brown Foundation Repair and Consulting, Inc. v. Henderson*,[110] the court found no violation of subsection (23) when the plaintiff failed to prove that the defendant knew a house was defective.[111] As the court noted in *Brown*, however, knowledge may be inferred in some cases.[112]

Another provision of the laundry list which is "gaining in popularity" is section 17.46(b)(12), which proscribes "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve."[113] In *Myers v. Ginsburg*,[114] a landlord was found to have violated subsection (12) by misrepresenting that he had a right under the lease to retain the tenants' equipment without selling it or crediting its fair market value against the amounts they owed him.[115] Similarly, in *Leonard v. Eskew*,[116] a seller who misrepresented his ability to convey the property in the contract as well as its potential productivity was found to have violated subsection (12).[117]

As others have noted, once a laundry list violation is established, few, if any, defenses exist. For example, the supreme court recently

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107. Alderman, *Innovative Use of the Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 45, 62-63 (1987).

108. 736 S.W.2d 750 (Tex. App.—Corpus Christi 1987), *writ dism'd*, 748 S.W.2d 227 (Tex. 1988).

109. *Id.* at 754.

110. 719 S.W.2d 229 (Tex. App.—Dallas 1986, no writ).

111. *Id.* at 230; *see also* Pfeiffer v. Ebby Halliday Real Estate, Inc., 747 S.W.2d 887, 890 (Tex. App.—Dallas 1988, no writ)(no violation of subsection (23) when seller had no knowledge of defective foundation). The court requires actual knowledge to find a violation. *Id.*

112. *Brown Foundation Repair*, 719 S.W.2d at 231.

113. TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (Vernon 1987). "This subsection has the potential to be one of the most far reaching of section 17.46." Alderman, *Innovative Use of the Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 45, 59 (1987).

114. 735 S.W.2d 600 (Tex. App.—Dallas 1987, no writ).

115. *Id.* at 605.

116. 731 S.W.2d 124 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

117. *Id.* at 130.

held in *Toca v. Wise*[118] that imputed notice under the recording statutes is not a defense.[119] In *Kennemore v. Bennett*,[120] the supreme court also held that a consumer does not waive remedies under the DTPA merely because he accepts the allegedly defective performance.[121] Thus, estoppel is no defense. Finally, the courts continue to follow the supreme court's holding in *Weitzel v. Barnes*[122] that reliance is not an element of a DTPA claim[123] and have disallowed a defense based on the Warsaw Convention.[124] Defendants have had more success, however, with defenses based on accord and satisfaction[125] and arbitration clauses.[126]

V. WARRANTY

Section 17.50(a)(2) permits a "consumer" to maintain a DTPA action whenever there has been a "breach of an express or implied warranty."[127] Thus, any warranty claim is also a DTPA claim. As the supreme court noted in *La Sara Grain Co. v. First National Bank of Mercedes*,[128] however, the DTPA does not create any warranties.[129] "[A]ny warranty must be established independently of the act."[130] While express warranties are imposed by agreement of the parties, implied warranties are generally created by operation of law.[131] Although most implied warranties are derived from statute,[132] some

118. 748 S.W.2d 449 (Tex. 1988).

119. *Id.* at 450-51.

120. 755 S.W.2d 89 (Tex. 1988).

121. *Id.* at 91.

122. 691 S.W.2d 598 (Tex. 1985).

123. *Id.* at 600. *But see* Walker v. Whitman, 759 S.W.2d 781, 783 (Tex. App.—Fort Worth 1988, no writ)(court apparently ignores *Weitzel*).

124. *See* Imtiaz v. Emery Airfreight, Inc., 728 S.W.2d 897, 899 (Tex. App.—Houston [1st Dist.] 1987, no writ)(airline's intentional misrepresentation that airport closed caused plaintiffs to miss connecting flight).

125. Jenkins v. Steakley Bros. Chevrolet Co., 712 S.W.2d 587, 590 (Tex. App.—Waco 1986, no writ).

126. *See* Ommani v. Doctor's Assocs., Inc., 789 F.2d 298, 299-300 (5th Cir. 1986)(valid arbitration clause enforced even though claim based on DTPA).

127. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987).

128. 673 S.W.2d 558 (Tex. 1984).

129. *Id.* at 565.

130. *Id.*

131. *See id.*

132. *See, e.g.*, TEX. BUS. & COM. CODE ANN. §§ 2.313, 2.314, 2.315 (Tex. UCC)(Vernon 1968).

have their origin at common law and are judicially created.[133]

Recent decisions indicate that the warranty provisions of the DTPA are gaining in significance as judges and attorneys continue to refine the relationship between the two legal doctrines. For example, most attorneys now recognize that all UCC warranty claims involving DTPA consumers may be plead through the DTPA. Additionally, and perhaps more importantly, the courts have been willing to expand existing warranty rights, even creating new warranties which may be plead through the DTPA.

Perhaps the most important warranty case recently decided by the supreme court is *Melody Home Manufacturing Co. v. Barnes.*[134] *Melody Home* involved the unsuccessful repair of a modular prefabricated home.[135] The Barneses sued, alleging breach of the implied warranty to repair in a good and workmanlike manner.[136] Following a jury verdict for the Barneses, the court of appeals affirmed.[137]

The supreme court also affirmed, holding that "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA."[138] The court continued, stating that the warranty is defined as "that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[139] Significantly, the court also stated "[w]e do not require repairmen to guarantee the *results* of their work; we only require those who repair or modify existing tangible goods or property to *perform* those services in a good and workmanlike manner."[140] Having established the existence of an implied warranty, and defined its meaning, the court concluded that "the implied warranty that repair and modification services of existing tangible goods or property will be performed in a good and workman-

133. *See* Humber v. Morton, 426 S.W.2d 554, 558-59 (Tex. 1968)(implied warranty of habitability).

134. 741 S.W.2d 349 (Tex. 1987).

135. *Id.* at 351.

136. *Id.*

137. *Id.* at 354.

138. *Id.* In *Dallas Power & Light Co. v. Westinghouse Elec. Corp.*, 855 F.2d 203 (5th Cir. 1988), the court strictly applied this language and refused to extend the warranty to create a duty to make repairs. *Id.* at 208.

139. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987).

140. *Id.* at 355.

like manner may not be waived or disclaimed."[141]

Melody Home establishes an implied warranty arising out of the repair or modification of existing goods similar to the implied warranty of merchantability arising in the sale of goods.[142] Significantly, however, the implied warranty of merchantability may be waived or disclaimed[143] while the implied warranty of good and workmanlike performance may not.

The decision in *Melody Home* was not issued without sharp disagreement on the court. In a separate concurring opinion, Justice Campbell, joined by Justice Wallace, stated that he felt the holding went far beyond what is required.[144] He advocated that the warranty be limited to the manufacturer of a product who purports to remedy a defect that existed at the time of the sale.[145] He also opposed the "dicta in the Court's opinion that purports to disallow parties to disclaim liability."[146]

In another opinion, Justice Gonzalez concurred, joined by Chief Justice Hill,[147] noting that while he joined in the court's judgment, he did not believe it was necessary to more than simply extend the implied warranty created by *Humber v. Morton*.[148] Based on legal precedent and policy, Justice Gonzalez argued that there was no reason to create a new cause of action under the DTPA premised on breach of an implied warranty of good and workmanlike performance.[149]

While opening the door to the implied warranty of good and workmanlike performance, *Melody Home* leaves many other thresholds to be crossed. The full scope, meaning, and effect of the warranty must yet be determined. For example, does the warranty apply to services other than repair or modification of existing goods? Specifically, does the warranty apply to professional services? Exactly what is the standard by which performance is measured? What is the relationship between the implied warranties created in the sale and those which

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141. *Id.*

142. TEX. BUS. & COM. CODE ANN. § 2.314 (Tex. UCC)(Vernon 1968).

143. *Id.* § 2.316(b).

144. *See* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 356 (Tex. 1987)(Campbell, J., concurring).

145. *id.*

146. *Id.*

147. *Id.* at 356-61 (Gonzalez, J., concurring).

148. *See id.* at 356; Humber v. Morton, 426 S.W.2d 554, 555 (Tex. 1968)(implied warranty that builder will construct home in good and workmanlike manner).

149. *See* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 356-61 (Tex. 1987).

arise out of the service of the product sold? To what extent may the parties determine by agreement the standards by which performance will be measured and the warranty evaluated? If the decision in *Archibald v. Act III Arabians*[150] is any indication, the court may be slow to expand *Melody Home*.

Act III Arabians involved a contract for horse training.[151] When the horse died as a result of allegedly improper training, the owner sued alleging negligence, gross negligence, and breach of warranty of good and workmanlike performance.[152] By a narrow margin, the supreme court found for the consumer, holding that a horse was an existing good and training was a "modification" of it.[153] Although asked to extend the warranty to professionals, the court continued the limited scope of the warranty established in *Melody Home*.[154] Even this application, however, was considered too broad by the two dissenting opinions.[155]

The implied warranty of good and workmanlike performance is not, however, the only implied warranty with which the court has recently dealt. In *Davidow v. Inwood North Professional Group*,[156] the court significantly expanded the implied warranty of habitability by creating an implied warranty of "suitability" in a commercial lease.[157] Finding that there is "no valid reason to imply a warranty of habitability in residential leases and not in commercial leases,"[158] the court held that "there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purposes."[159] While *Davidow* was not a DTPA case, there is no reason why this warranty could not be plead pursuant to the DTPA whenever the tenant is a "consumer."[160]

Another area of warranty law and its relationship to the DTPA

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150. 755 S.W.2d 84 (Tex. 1988).

151. *Id.* at 85.

152. *Id.*

153. *Id.* at 86.

154. *Id.*

155. Archibald v. Act III Arabians, 755 S.W.2d 84, 86-88 (Tex. 1988) (Wallace, J., dissenting) (joined by Justice Culver).

156. 747 S.W.2d 373 (Tex. 1988).

157. *Id.* at 376-77.

158. *Id.*

159. *Id.* at 377.

160. *See* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987) (consumer excludes business consumers with over $25 million in assets).

that has repeatedly faced the courts is how disclaimers or limitations of warranties should be treated when the warranty claim itself is plead through the DTPA. Although waivers of the DTPA are expressly prohibited,[161] in most cases, warranties may be waived or limitations may be placed on damages recoverable for breach.[162] Therefore, there is an apparent conflict between the DTPA and warranty law when a warranty which has been disclaimed or limited is plead through the DTPA. At the extremes, this conflict has been resolved.

In *La Sara Grain*, the supreme court made it clear that whether a warranty exists is a question to be resolved outside of the DTPA.[163] The DTPA does not establish any statutory or common-law warranties. It simply provides a vehicle through which they may be litigated. At the opposite end of the spectrum, *Weitzel v. Barnes*[164] established that an "as is" disclaimer, which would be effective to disclaim contractual liability, is of no consequence when the action is plead pursuant to the DTPA's laundry list.[165] What is unresolved is the effectiveness of a disclaimer or limitation on a warranty when the DTPA action is based on that warranty.[166] *Alvarado v. Bolton*,[167] although not directly on point, is instructive.

Alvarado involved the effect of the merger doctrine on a warranty action plead under the DTPA.[168] The defendant argued that no warranty claim existed because the contract merged into the deed.[169] The court disagreed, citing *Weitzel*, and held that the merger doctrine is

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161. *See id.* § 17.42. Section 17.42 provides that "any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void . . . ." *Id.*; *see also* Poe v. Hutchings, 737 S.W.2d 574, 580 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

162. TEX. BUS. & COM. CODE ANN. §§ 2.316, 2.718, 2.719 (Tex. UCC)(Vernon 1968).

163. *See* La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984).

164. 691 S.W.2d 598 (Tex. 1985).

165. *See id.* at 601; *see also* Mercedes Benz of N. Am., Inc. v. Dickenson, 720 S.W.2d 844, 852-55 (Tex. App.—Fort Worth 1986, no writ)(breach of warranty negligence and DTPA action brought against car manufacturer); Crossland Sav. Bank FSB v. Constant, 737 S.W.2d 19, 20 (Tex. App.—Corpus Christi 1988, no writ)(bank sued for deceptive trade practices).

166. *See* Rinehart v. Sonitrol of Dallas, Inc. 620 S.W.2d 660, 662-63 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). In *Rinehart*, the court held that the contractual limitation was effective to limit the consumer's actual damages, but not the trebling of those damages under the DTPA. *Id.* at 663-64. A similar result was recently reached in *Harley-Davidson Motor Co. v. Young*, 720 S.W.2d 211, 217 (Tex. App.—Houston [14th Dist.] 1986, no writ).

167. 749 S.W.2d 47 (Tex. 1988).

168. *Id.* at 47-48.

169. *Id.*

inapplicable to a DTPA action for breach of warranty.[170] Thus, at least with respect to the merger doctrine, warranties which may not exist outside of the DTPA may be resurrected through a DTPA pleading.[171]

Finally, the question of what constitutes a warranty continues to appear in the opinions. Ever since *Smith v. Baldwin*,[172] the courts have grappled with what it takes to turn a "simple breach of contract" into a breach of warranty or a violation of the DTPA. In *Brooks, Tarlton, Gilbert, Douglas & Kessler v. United States Fire Insurance Co.*,[173] the Fifth Circuit was faced with determining what constitutes a warranty in a contract of insurance.

Brooks involved a claim by a law firm against its insurer for the failure to defend.[174] The law firm sued for, among other things, breach of an express warranty.[175] Noting that Texas courts treat the question of express warranty as a question of law, the court examined whether the company's promise to defend constituted an express war-

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170. *Id.* at 48-49.

171. As one of the authors has noted elsewhere, this reasoning may be incorrect:

> For the first time in a DTPA case that a consumer won, I find I must join with the dissent. The DTPA does not establish or enlarge the rights arising to a consumer under warranty law. *See La Sara*. A consumer may maintain an action pursuant to the DTPA whenever there has been breach of an express or implied warranty. The existence of, waiver of, or scope and applicability of that warranty, however, are determined by sources of law other than the DTPA. In fact, subsection (19) of section 17.46, expressly recognizes that the disclaimer provisions of the UCC (including the parol evidence section incorporated through section 2.316(1)) are not effected [sic] by the DTPA. There is no basis, in the DTPA, its underlying purpose, or the legislative history surrounding it, for concluding that the Act creates or expands warranty rights. The clear purpose of section 17.50(a)(2) is simply to give a consumer who has suffered damages because of a breach of warranty an additional vehicle through which to pursue a remedy. This is not to say, however, that I do not sympathize with the plaintiff, nor do I feel he does not have a valid cause of action under the Act. If the consumer was mislead [sic] by the seller's statements or conduct, a laundry list violation, under section 17.46(b)(5), (7) or (12) could have been alleged and proven. If a suit was brought on this basis the doctrine of merger would not apply. Even the dissent seems to agree with this. *See Weitzel.*

Editor's Comment, 13 CAVEAT VENDOR 66 (1988).

172. 611 S.W.2d 611 (Tex. 1980).

173. 832 F.2d 1358 (5th Cir. 1987); *see also* FDP Corp. v. Southwestern Bell Tel. Co., 749 S.W.2d 569, 571 (Tex. App.—Houston [1st Dist.] 1988, no writ). In *FDP Corp.*, the court stated: "[b]ecause this was a case of a breached express warranty to provide goods or services, appellant could sue under sec. 17.50, and the contractual limitation of liability was ineffective." *Id.*

174. *Brooks*, 832 F.2d at 1360.

175. *Id.*

ranty.[176] Using the Uniform Commercial Code by analogy,[177] the court noted that there is a difference between a seller's failure to deliver (a breach of contract) and the seller's failure to deliver conforming goods (a breach of warranty).[178] The Code, according to the court, distinguishes between the remedies based on delivery and acceptance of the goods.[179] This distinction is important because a buyer's ability to sue for breach of warranty arises only after acceptance. Under the Code, a breach of warranty does not occur when the seller completely fails to deliver.[180]

Applying a similar standard to service contracts, the court stated "the buyer has a cause of action under the DTPA for breach of an express warranty when the focus of the express promise is on the way in which the service is to be performed, but not when the focus is only on the fact that service is promised."[181] Applying this rule, the court held "that the mere promise by an insurance company that it will defend is not an express warranty of performance."[182] Thus, although the plaintiff was successful in establishing a claim for breach of contract, it did not have a warranty claim actionable under the DTPA.[183]

Courts have uniformly held that "mere breach" of contract is not a violation of the DTPA.[184] Therefore, attorneys must either establish an independent violation of the DTPA (for example, a laundry list violation) or an independent warranty.[185] As the decision in *Brooks* indicates, establishing a warranty may not be simple. It is clear that those seeking to establish a warranty action pursuant to the DTPA

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176. *Id.* at 1374.

177. *Id.* at 1376-77.

178. Brooks, Tarlton, Gilbert, Douglas & Kessler v. United States Fire Ins. Co., 832 F.2d 1358, 1376-77 (5th Cir. 1987). Buyer's ability to sue for breach of warranty arises only under Uniform Commercial Code section 2.714, which requires the acceptance of nonconforming goods.

179. *Id.* at 1375.

180. *Id.*

181. *Id.*

182. *Id.* at 1376.

183. *See* Brooks, Tarlton, Gilbert, Douglas & Kessler v. United States Fire Ins. Co., 832 F.2d 1358, 1378 (5th Cir. 1987).

184. *See, e.g.*, International Nickel Co. v. Trammel Crow Distrib. Corp., 803 F.2d 150, 155 (5th Cir. 1986); Helms v. Southwestern Bell Tel. Co., 794 F.2d 188, 191 (5th Cir. 1986); Dura-Wood Treating Co. v. Century Forest Indus., Inc., 675 F.2d 745, 756 (5th Cir. 1982); La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984); Ashford Dev., Inc. v. USLife Real Estate Serv. Corp., 661 S.W.2d 933, 935 (Tex. 1983).

185. *See* FDP Corp. v. Southwestern Bell Tel. Co., 749 S.W.2d 569, 571 (Tex. App.—Houston [1st Dist.] 1988, no writ)(breach of warranty found).

must take steps to cross the threshold established by the "mere breach of contract" language so often applied.

VI. NOTICE, DAMAGES AND ATTORNEY'S FEES

A. *Notice*

Section 17.505(a)[186] provides that as a prerequisite to filing suit for damages, a consumer must give notice to the defendant thirty days prior to filing.[187] An exception to this rule is when the giving of thirty days notice is rendered impracticable by reason of the necessity of filing suit to prevent the expiration of the statute of limitations.[188] In an interesting application of this provision, the court in *Russell v. Campbell*[189] held that notice need not be given when a petition is amended to add a DTPA claim, if the amendment must be filed sooner to avoid the running of the statute of limitations.[190]

Section 17.505(a) also states what must be included within the notice for it to be legally sufficient.[191] During the past two years, the courts have continued to ponder this provision as well as the effect of noncompliance. For example, in *Cielo Dorado Development v. Certainteed Corp.*,[192] the supreme court held that where the defendant failed to object to non-submission of the issue of proper notice, the omitted issue should be deemed as found by the trial court where the consumer's attorney testified that notice had been properly given.[193] Justice Gonzalez, in a dissenting opinion joined by Chief Justice Phillips and Justice Wallace, argued that the plaintiff must prove that notice was given and that it complied with the requirements of section 17.50(a).[194] Taking issue with the majority, Justice Gonzalez stated that the defendant's attorney's statement that notice was sent without offering the letter into evidence or testifying as to its content did not

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186. TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon 1987). This section was renumbered in 1987; previously, it was section 17.50A.

187. *Id.*

188. *Id.* § 17.505(b).

189. 725 S.W.2d 739 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

190. *See id.* at 746.

191. *See* TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon 1987). Section 17.505 provides that the consumer "shall give written notice to the person at least 30 days before filing the suit advising the person of the consumer's specific complaint and the amount of actual damages and expenses, including reasonable attorneys' fees . . . ."

192. 744 S.W.2d 10 (Tex. 1988).

193. *Id.* at 11.

194. *Id.*

meet the burden of proof placed on the plaintiff.[195] An interesting aspect of Gonzalez's dissent was his conclusion that the case should be remanded for abatement.[196] Although the supreme court has not directly addressed the question of the effect of the failure to give proper notice, this statement appears to approve the result reached by several lower courts considering this point.[197]

In another notice case, *Investors, Inc. v. Hadley*,[198] the court reached a result similar to that of *Cielo*, but on different grounds. In *Investors*, the plaintiff plead proper notice and the defendant, unlike the defendant in *Cielo*, did not specifically deny notice.[199] Relying on rule 54, the court held that once plead, notice must only be proven when specifically denied.[200]

Finally, in considering what constitutes sufficient notice, the courts continue to liberally interpret the requirements of section 17.505 to find that nearly anything that lets the defendant know that the consumer has a complaint, and the amount of damages, will suffice.[201] In *McCann v. Brown*,[202] the court recited the purpose of the notice letter, which is to provide the defendant with a chance to settle and held that the following language constituted sufficient notice:

> Your actions unquestionably constitute a violation of the Texas Deceptive Trade Practices Act. They also constitute common law fraud. We hereby give notice pursuant to those statutes and failure to deliver the trailer which was purchased will result in us seeking out full legal damages including penalties, interest and attorney's fees.[203]

Despite the failure to include the consumer's "actual damages" and the failure to give the "specific complaint" as required by section

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195. *Id.* at 12.

196. *Id.*

197. *See* Sunshine Datsun, Inc. v. Ramsey, 680 S.W.2d 652, 655 (Tex. App.—Amarillo 1984, no writ)(where consumer fails to give notice and defendant objects to failure, abatement of suit is proper).

198. 738 S.W.2d 737 (Tex. App.—Austin 1987, writ denied).

199. *Id.* at 741-42.

200. *Id.*

201. *See* Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 242 (Tex. 1985)(letter sent by consumers' attorney to contractor sufficient notice); North Am. Van Lines of Texas, Inc. v. Bauerle, 678 S.W.2d 229, 235 (Tex. App.—Fort Worth 1984, writ ref'd n.r e.)(letter sent to movers stating claim being made for damaged goods sufficient notice).

202. 725 S.W.2d 822 (Tex. App.—Fort Worth 1987, no writ).

203. *Id.* at 825.

17.505,[204] the court held the letter sufficient to satisfy the statute.[205]

B. *Damages*

Section 17.50 provides various forms of relief for the prevailing plaintiff in a DTPA action.[206] Although several forms of equitable relief are available to the consumer, the most common relief sought is "actual damages" appropriately increased by DTPA penalties.[207] Since the court's decision in *Jim Walter Homes, Inc. v. Valencia*,[208] it is clear that the first $1,000 of the damages are automatically trebled. Damages above that amount may be increased up to a maximum of trebling if the trier of fact finds the defendant's conduct to be committed knowingly.[209] The courts also require that to obtain discretionary

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204. TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987).

205. *McCann*, 725 S.W.2d at 825.

206. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1987). In most cases, the damages will be awarded against a party with whom the consumer dealt, but as the supreme court made clear in *Home Savings Association v. Guerra*, 733 S.W.2d 134 (Tex. 1987), in some cases, the consumer may maintain an action against a remote party with whom the consumer had no dealing. *See id.* at 136-37. In *Guerra*, the consumer brought an action against a seller as well as the assignee of the seller's retail installment contract. *See id.* at 134. In compliance with Federal Trade Commission Rule 433, the contract contained the following provision:

> Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. *Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.*

Id. at 135. As the Texas Supreme Court noted, the effect of this provision is to preclude holder in due course status and to allow the consumer to maintain an action against the assignee. *Id.* at 135. In accordance with the rule, the court limited the consumer's right against the assignee to the "amounts paid by the debtor hereunder," in the instant case, $1,256.90. *Id.* at 137. Note that under this rule, the assignee takes subject to the consumer's defenses, including a claim that the DTPA was violated. *See* Alvarez v. Union Mortgage Co., 747 S.W.2d 484, 486 (Tex. App.—San Antonio 1988, no writ).

207. TEX. BUS. & COM. CODE ANN. § 17.50(b) (Vernon 1987). Section 17.50(b) provides:

> [E]ach consumer who prevails may obtain:
>
> (1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000.

Id.

208. 690 S.W.2d 239 (Tex. 1985); *see also* Danny Darby Real Estate, Inc. v. Jacobs, 760 S.W.2d 711, 717 (Tex. App.—Dallas 1988, n.w.h.).

209. *Id.* at 241; *see also* Fairmont Homes, Inc. v. Upchurch, 711 S.W.2d 618, 619 (Tex. 1986). Knowingly is defined as:

> [A]ctual awareness of the falsity, deception, or unfairness of the act or practice giving rise

damages for an amount in excess of $1,000, the consumer must request a special issue regarding the award.[210] It should be emphasized, however, that the present damage formula, requiring a showing of knowingly before trebling, went into effect in August of 1979. Cases based on an act or practice which occurred prior to that date will still be controlled by the earlier provisions which required mandatory trebling of damages.[211]

Determining actual damages continues to appear to be simply a question of proof. The legal standard, "those damages recoverable at common law," coupled with the mandate that that standard should be applied in the manner designed to give the consumer the greatest recovery,[212] affords great leeway to consumers' attorneys. Additionally, the court's decision in *Luna v. North Star Dodge Sales*[213] makes it clear that damages for mental anguish are recoverable on proof of a willful tort, willful or wanton disregard, or gross negligence.[214] In *Luna*, the court also held that because knowingly is a higher standard than gross negligence, if mental anguish is recoverable where gross negligence is shown, it may also be recovered upon a showing of knowingly.[215]

Recent decisions add little in the way of new law to the existing case law with respect to what damages are recoverable under the DTPA. They indicate, however, that the courts are continuing to liberally interpret the Act to make the consumer whole. For example,

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to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act or practice constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

TEX. BUS. & COM. CODE ANN. § 17.45(9) (Vernon 1987); *see also* Sunrizon Homes, Inc. v. Fuller, 747 S.W.2d 530, 532 (Tex. App.—San Antonio 1988, writ denied)(failure to answer constitutes admission conduct was done knowingly).

210. *See* Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 810-11 (Tex. App.—Dallas 1987, no writ).

211. *See, e.g.*, Russell v. Campbell, 725 S.W.2d 739, 747 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); Robinwood Bldg. and Dev. Co. v. Pettigrew, 737 S.W.2d 110, 112 (Tex. App.—Tyler 1987, no writ); Wood v. Component Constr. Corp., 722 S.W.2d 439, 443 (Tex. App.—Fort Worth 1986, no writ).

212. *See* Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985); Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 373 (Tex. 1984); Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. App.—Waco 1978, writ ref'd n.r.e.).

213. 667 S.W.2d 115 (Tex. 1984).

214. *Id.* at 117.

215. *Id.*

Ludt v. McCollum[216] held that a consumer may recover both cost of repairs and difference in market value,[217] and *Brighton Homes, Inc. v. McAdams*[218] restated the rule that the consumer should be awarded the greatest amount of actual damages. Accordingly, the court in *Brighton Homes* held that damages should be based on diminished fair market value, rather than the lower cost of repairs.[219] Similarly, *Investors, Inc. v. Hadley*[220] applied the definition of actual damages, those recoverable at common law, to allow the award of consequential damages resulting from the breach of an agreement to lend money.[221] Using the same rules, the court in *McCann v. Brown*[222] chose loss of the bargain as the appropriate measure of damages.[223]

DTPA damages, however, may not be based on speculation alone and must be capable of proof. For example, in *Flemming Manufacturing Co., Inc. v. Capitol Brick, Inc.*,[224] a brick manufacturer attempted to recover its lost profits.[225] The court noted that while lost profits is a proper measure of damages under the DTPA, damages must be shown with reasonable certainty by competent evidence.[226] Because the damages were not proved at the default hearing with the necessary degree of certainty, the court remanded the case for a new trial.[227] Similarly, in *Frank B. Hall & Co. v. Beach, Inc.*,[228] the court held that damages must not be based on speculation.[229]

An additional question relating to damages that repeatedly appears before the courts is the effect of offsets on the consumer's damages. In

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216. 32 Tex. Sup. Ct. J. 50 (Oct. 26, 1988).

217. *Id.* at 51.

218. 737 S.W.2d 340 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

219. *Id.* at 342.

220. 738 S.W.2d 737 (Tex. App.—Austin 1987, writ denied).

221. *Id.* at 738-39.

222. 725 S.W.2d 822 (Tex. App.—Fort Worth 1987, no writ).

223. *Id.* at 824 (measure for loss of bargain when seller breaches is difference between value at time buyer learns of breach and contract price).

224. 734 S.W.2d 405 (Tex. App.—Austin 1987, writ ref'd n.r.e.)(on remand). On appeal to the supreme court, the case was reversed, and the cause was remanded. The supreme court disagreed on the sufficiency of the evidence, but the requirement of competent evidence still stands. Capitol Brick, Inc. v. Flemming Mfg. Co., Inc., 722 S.W.2d 399, 402 (Tex. 1986).

225. *Id.* at 406.

226. *Id.* at 407.

227. *Id.* at 409.

228. 733 S.W.2d 251 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); *see also* Powell-Buick-Pontiac GMC, Inc. v. Bowers, 718 S.W.2d 12, 13 (Tex. App.—Tyler 1986, writ ref'd n.r.e.)(consumer must establish damages).

229. *Frank B. Hall*, 733 S.W.2d at 258 (damages calculated on objective facts).

Smith v. Baldwin,[230] the supreme court stated that offsets to the defendant are made prior to trebling the consumer's recovery.[231] This rule has been uniformly followed by the courts.[232]

Finally, the relationship between the DTPA and recovery under alternative theories, most importantly those which permit exemplary damages, continues to be raised. Courts are asked to resolve two questions: what relief should be granted a consumer who successfully pleads his or her claim through several alternative theories of recovery, and when, if at all, can a successful DTPA consumer also recover exemplary damages. For example, in *Birchfield v. Texarkana Memorial Hospital*,[233] the consumer received favorable jury findings on alternative claims.[234] When the Birchfields failed to elect DTPA recovery, the lower court held they waived the right to appeal the court's failure to award DTPA additional damages.[235] The Texas Supreme Court reversed, stating that the proper procedure where the prevailing party failed to elect between alternative measures of damages is to award the measure which provides the greater recovery.[236]

The court in *Birchfield* also refused to grant plaintiffs additional exemplary damages because they failed to establish an independent act sufficient to support such recovery.[237] This is consistent with the decisions in *Mayo v. John Hancock Mutual Life Insurance Co.*[238] and *Jim Walter Homes, Inc. v. Reed*.[239] In *Mayo*, the court held that the DTPA does not prevent a consumer from recovering under the DTPA and another theory so long as the claims are not based on the "same act."[240] Thus, in *Mayo*, recovery was had under the DTPA

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230. 611 S.W.2d 611 (Tex. 1980).

231. *Id.* at 617.

232. *See* Streeter v. Thompson, 751 S.W.2d 329, 331 (Tex. App.—Fort Worth 1988, no writ); Acco Constructors, Inc. v. National Steel Prods. Co., 733 S.W.2d 368, 370 (Tex. App.—Houston [14th Dist.] 1987, no writ).

233. 747 S.W.2d 361 (Tex. 1987).

234. *Id.* at 364-65.

235. *Id.* at 367.

236. *Id.*; *see also* Boyce Iron Works, Inc. v. Southwestern Bell Tel. Co., 747 S.W.2d 785, 787 (Tex. 1988)(prevailing party may seek recovery under alternative theory if judgment reversed); American Baler Co. v. SRS Sys., Inc., 748 S.W.2d 243, 246 (Tex. App.—Houston [1st Dist.] 1988, writ denied)(court should use findings allowing greatest recovery).

237. Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 368-69 (Tex. 1987).

238. 711 S.W.2d 5 (Tex. 1986).

239. 711 S.W.2d 617 (Tex. 1986).

240. *Mayo*, 711 S.W.2d at 6; *see also* TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon 1987).

and the Insurance Code.[241] In *Reed*, the court considered whether DTPA damages and exemplary damages could be awarded.[242] Again, following the same reasoning, the court held that exemplary damages may be recovered only where the consumer establishes "a distinct tortious injury with actual damages."[243]

In another case involving the relationship between DTPA recovery and exemplary damages, *Consolidated Texas Financial v. Shearer*,[244] a consumer who pled its claim under alternative theories was awarded exemplary damages rather than the DTPA recovery when the exemplary damages were the greater amount.[245] *Shearer* also held that the fact that the plaintiff chose an equitable recovery rather than monetary relief does not preclude the recovery of punitive damages.[246] Following the rule laid down in *Nabours v. Longview Savings & Loan Association*,[247] all that is required to support the award of punitive damages is a finding of actual damages, even if the action is equitable rather than legal.[248]

Finally, the question of waiver and estoppel, with respect to a DTPA claim, was recently examined by the supreme court. In *Kennemore v. Bennett*,[249] the court considered whether taking possession of a home and paying in full estopped the consumer from seeking relief under the DTPA and waived any complaint regarding performance.[250] Noting the difference between contract actions and actions under the DTPA, the supreme court held that remedies under the Act "are available to any consumer, and they are not waived merely because the consumer accepts the allegedly defective performance."[251] In fact, the court continues, "[s]uch a policy would discourage the resolution of disputes and the settlement of claims without any corresponding benefits."[252] The court then found that there was sufficient

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241. *Mayo*, 711 S.W.2d at 7; *see also* Kish v. Van Note, 692 S.W.2d 463, 467 (Tex. 1985)(recovery under DTPA and Consumer Credit Code).

242. *Reed*, 711 S.W.2d at 618.

243. *Id.*

244. 739 S.W.2d 477 (Tex. App.—Fort Worth 1987, writ ref'd).

245. *Id.* at 479-80.

246. *Id.* at 479.

247. 700 S.W.2d 901 (Tex. 1985)(homeowner's DTPA action to prohibit foreclosure).

248. *See id.* at 903.

249. 755 S.W.2d 89 (Tex. 1988).

250. *Id.* at 91.

251. *Id.*

252. *Id.*

evidence from which a jury could find a breach of the implied warranty of good and workmanlike performance as well as unconscionability.[253]

C. *Attorney's Fees*

Section 17.50(d) provides that a consumer who prevails "shall be awarded court costs and reasonable and necessary attorney's fees."[254] The courts have no problem applying the mandatory nature of this provision, and reasonable and necessary is usually interpreted to mean fees based on an hourly rate.[255] Although there is no reason why this language could not be employed to authorize a contingency fee, courts seem reluctant to do so, and attorneys seem reluctant to ask. One point that has repeatedly been noted with respect to attorney's fees is that the award is made to the plaintiff, not to the attorney.[256]

The more controversial attorney fee provision of the Act is section 17.50(c) which mandates the award of attorney's fees to the defendant when the consumer's action was "groundless and brought in bad faith, or brought for the purpose of harassment."[257] This language was interpreted in *Leissner v. Schott*[258] to require a finding of groundlessness only when attorney's fees are being sought upon an allegation of bad faith. Upon a finding of harassment, attorney's fees may be awarded without a finding of groundlessness.[259] For example, in *Shenandoah v. J & K Properties, Inc.*,[260] the jury found that the plaintiff's suit was brought in bad faith and for purposes of harassment.[261] Although there was no finding that the suits were groundless, the

253. *Id.* at 92.

254. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987).

255. *See* Perma Stone-Surfa Shield Co. v. Merideth, 752 S.W.2d 224, 227-28 (Tex. App.—San Antonio 1988, no writ)(implies attorney fees based on hourly rate).

256. Streetcar v. Thompson, 751 S.W.2d 329, 331 (Tex. App.—Fort Worth 1988, no writ).

257. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987). This section provides that "[o]n a finding by the court that an action under this section was groundless and brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs." *Id.* Note that this language is not discretionary. Once the proper findings are made, attorney's fees are mandatory. *See* Intertex v. Cowden, 728 S.W.2d 813, 820 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

258. 668 S.W.2d 686 (Tex. 1984).

259. *Id.*

260. 741 S.W.2d 470 (Tex. App.—Dallas 1987, writ denied).

261. *Id.* at 473.

court held that such a finding was not necessary once the finding of harassment was made.[262]

Shenandoah also raises another interesting and unresolved question: Who makes the finding of groundlessness, bad faith, or harassment? Section 17.50(d) specifically states: "On a finding by the court."[263] A literal reading would require that all the findings be made by the court, not the jury. In *Leissner*, however, the court confused this point by citing several lower court decisions which held that while the jury decides bad faith and harassment, the court must determine if the suit was groundless.[264] This rationale, followed in *Shenandoah*, is inconsistent with the express language of section 17.50(d).[265]

Another decision following the principle of allowing the jury to determine bad faith while the court determines groundlessness is *Zak v. Parks*.[266] *Zak* also examined what is required to show a suit is groundless. Zak argued that as a matter of law the suit was not groundless because the court ruled there was sufficient evidence for the case to go to the jury.[267] The court rejected this notion and held that a court may deny the defendant's motion for an instructed verdict and subsequently find the suit groundless.[268] In making the determination of groundlessness, the court must consider undisputed fact issues, law issues and jury findings.[269] Taking this approach, the court found that the suit was groundless as a matter of law.[270] The court also found that:

> The demands of the Zaks stated in their letter manifest ill will, spite and considerably more desire to punish the Parks than to resolve any differences. From a review of the evidence we see no realistic basis for the

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262. *Id.* at 477. *But see* Myer v. Splettstosser, 759 S.W.2d 514, 518 (Tex. App.—Austin 1988, n.w.h.)(finding of groundlessness must be made).

263. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987).

264. *See* Leissner v. Schott, 668 S.W.2d 686, 686 (Tex. 1984).

265. *See* TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987); *see also* Howell v. Homecraft Land Dev., 749 S.W.2d 103, 113 (Tex. App.—Dallas 1987, writ denied)(attorney's fees awarded following finding of bad faith by jury); Preston II Chrysler—Dodge, Inc. v. Donwerth, 744 S.W.2d 142, 145 (Tex. App.—Dallas 1987, writ granted)(jury determines bad faith). *But see Myer*, 759 S.W.2d at 516 (wherein court followed express language of statute and held that all issues are for court, not jury).

266. 729 S.W.2d 875 (Tex. App.—Houston [14th Dist.] 1987, no writ).

267. *Id.* at 878.

268. *Id.*

269. *Id.*

270. *Id.*

> claims of the Zaks against the Parks and find sufficient evidence in the record to support the jury's finding that the suit was brought in bad faith or for the purposes of harassment.[271]

Note that with a jury finding of harassment, the court's finding of groundlessness was superfluous.

VII. CONCLUSION

It is safe to say that the Deceptive Trade Practices Act has evolved into one of the state's most important laws. Most civil litigation involves at least one claim under the Act, and many cases are settled prior to litigation due to the penalties imposed by the DTPA.

This article was written to help keep practitioners current with recent developments under the DTPA, however, it was written with one caveat: before relying on any DTPA decision, be sure to update your research to see if the law or its interpretation and application has changed. Like the painters of the Golden Gate Bridge, the work of the DTPA attorney is never finished. Once you think you have found the most recent statement of the law, you must again begin your search for more recent decisions.[272]

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271. Zak v. Parks, 729 S.W.2d 875, 880 (Tex. App.—Houston [14th Dist.] 1987, no writ).

272. One way of keeping current with this act is to subscribe to one of the available reporting services, e.g., CAVEAT VENDOR, published by the Consumer Law Section of the State Bar, or TEXAS CONSUMER LAW REPORTER, published by Texas Law Letter, Inc.