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Aspects of Defending a Texas Deceptive Trade Practices - Consumer Protection Act Claim.

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ASPECTS OF DEFENDING A TEXAS DECEPTIVE TRADE PRACTICES — CONSUMER PROTECTION ACT CLAIM

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I. INTRODUCTION

The Texas Supreme Court has ruled that the purpose of the Texas Deceptive Trade Practices - Consumer Protection Act (the "DTPA") is to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in common-law fraud or breach of contract or warranty suits.[1] Therefore, the title to this Article when considering the liberal construction mandated by the Legislature:

> This subchapter [the DTPA] shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices,

is almost an oxymoron.[2] In *Smith v. Baldwin*,[3] the supreme court ruled that because a DTPA cause of action is specifically created by statute, only the defenses set forth in the statute apply.[4] The court reasoned that common-law defenses to the more traditional tort and

1. Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1981). The Fifth Circuit joined in this abrogation of a defendant's rights in *Pope v. Rollins Protective Services Co.*, 703 F.2d 197, 201-02 (5th Cir. 1983), citing *Smith v. Baldwin* and purporting to rely on the liberal construction mandated by legislature:

> This subchapter [the DTPA] shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions and breaches of warranty, and to provide efficient and economical procedures to secure such protection.

See also TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987). Neither the stated purpose nor the actual terms of the statute, however, mandate the inapplicability of all common law defenses.

2. Similar to the term "Jumbo Shrimp" in practical application, traditional defenses asserted in a DTPA action are scoffed at by plaintiff's counsel and ignored by most courts.

3. 611 S.W.2d 611 (Tex. 1981).

4. *Id.* at 616. The Texas Supreme Court rejected a contractor's defense of substantial performance by ruling "[w]hether this is so or not, the Legislature in the DTPA did not provide that substantial performance is a defense to an action under the statute . . . ." *Id.* at 614.

contract causes of action are not material in DTPA cases because the DTPA is not a codification of common law,[5] but rather a statutory creation filling a perceived void between actionable fraud and breaches of warranty without the burden of proof or defenses applying under common-law theories of recovery.[6] The legislature, however, provided very few statutory defenses[7] and even those provided are very specific and limited to factual situations which rarely arise in the real world.[8] Texas courts have repeatedly held that the following common-law defenses normally available in cases arising under theories of fraud and breach of contract are not available in consumer actions under the DTPA: substantial performance of a contract,[9] contributory negligence,[10] estoppel,[11] no common-law duty to dis-

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5. *Id.* at 616. Neither the court's judicial reasoning nor the factual assertion is accurate, as 14 of the 23 laundry-list DTPA violations involve misrepresentations and/or failures to disclose material facts such that the misrepresentation and/or omission would constitute a common law fraud. The fact that the legislature codified a series of specific types of misrepresentations otherwise actionable at common law provides no legitimate basis to deny traditional common-law fraud defenses.

6. *Id.* at 616.

7. TEX. BUS. & COM. CODE ANN. § 17.506 (Vernon 1987). The 1979 amendments added two new "absolute defenses" to a DTPA action, namely "a third party misinformation defense" and "a full tender defense." Prior to 1979, these defenses would have only limited the plaintiff's recovery to actual damages and attorney's fees as set forth in section 17.50A. These defenses are "absolute" only because the consumer either has already been paid 100% of his demand (including attorney's fees) or has a DTPA cause of action against the third party supplier of the misinformation (other than governmental suppliers), if the third party knew or should have reasonably foreseen that the information would be provided to a consumer.

8. Perhaps the only ironclad defense to a DTPA claim is section 17.505(d) which provides an affirmative defense if the defendant tenders to the plaintiff the amount demanded, including attorney's fees, within 30 days of receipt of plaintiff's demand. This defense has little appeal to the average defendant who either believes the plaintiff's claims are without merit or the claimed damages have no relationship with reality. Further, all statutory defenses must be specifically plead. *See* Trial v. McCoy, 581 S.W.2d 792, 794 (Tex. Civ. App.—El Paso 1979, no writ); Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656, 664 (Tex. Civ. App.—Amarillo 1975, no writ).

9. Smith v. Baldwin, 611 S.W.2d 611, 614 (Tex. 1981).

10. *See* William M. Mercer, Inc. v. Woods, 717 S.W.2d 392, 401 (Tex. App.—Texarkana 1986, no writ)(contributory negligence defense available if common-law negligence claim asserted with DTPA claim). Also, comparative causation is a defense in a breach of warranty claim where it is accompanied by a strict tort liability claim, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984), and where consequential economic damages are sought to the extent that buyer's negligence was a concurring proximate cause of damages, *Signal Oil & Gas v. Universal Oil Products*, 572 S.W.2d 320 (Tex. 1978). *Signal Oil & Gas* has been extended to be applicable also to express warranties in *Indust-Ri-Chem Laboratory v. Par-Pak Co., Inc.*, 602 S.W.2d 282 (Tex. Civ. App.—Dallas 1980, no writ).

close,[12] impossibility of completion,[13] misrepresentation by a policy holder,[14] failure of consideration,[15] the parol evidence rule,[16] contractual limitation of the "as is" disclaimer and/or right to inspect provision,[17] no reliance,[18] merger,[19] bona fide error,[20] imputed notice under the recording statutes,[21] and waiver by acceptance.[22] Common-law defenses are available in DTPA actions in some limited instances.[23]

11. Home Sav. Ass'n v. Guerra, 720 S.W.2d 636, 644 (Tex. App.—San Antonio), *aff'd in part, rev'd in part*, 733 S.W.2d 134 (Tex. 1986).

12. West v. Carter, 712 S.W.2d 569, 573 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

13. Roy E. Thomas Constr. Co. v. Arbs, 692 S.W.2d 926, 932 (Tex. App.—Fort Worth), *writ ref'd n.r.e.*, 700 S.W.2d 919 (Tex. 1985).

14. Southern Life and Health Ins. Co. v. Nedrano, 698 S.W.2d 457, 461 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). The court did recognize fraud by the policy holder as a defense to the contract actual damage claim. It is difficult to follow the logic of how fraud in the inducement may not be a defense to a treble and/or multiple damage claim, when those same facts are recognized as a total defense to the contract claim urged by the same plaintiff in the same action.

15. Joseph v. PPG Indus., Inc., 674 S.W.2d 862, 865-66 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

16. Weitzel v. Barnes, 691 S.W.2d 598, 599-600 (Tex. 1985); Honeywell v. Imperial Condominium Ass'n, Inc., 716 S.W.2d 75, 78 (Tex. App.—Dallas 1986, no writ); Oaks v. Guerra, 603 S.W.2d 371, 374 (Tex. Civ. App.—Amarillo 1980, no writ). First, the parol evidence rule is not a common-law defense, but rather a rule of evidence. All rules of evidence are applicable in the trial of a DTPA action. If considered a "common-law defense," perhaps it is the only "common-law defense" probably not allowed since the subject oral representations are the operative facts made the basis of DTPA action. *See Weitzel*, 691 S.W.2d at 600.

17. *Weitzel*, 691 S.W.2d at 601.

18. *Id.* at 600. Absence of reliance may not be a defense to a DTPA action; however, in the absence of reliance, the prohibited conduct may not be a producing cause of the damages. *See* Higgenbotham & Assocs., Inc. v. Greer, 738 S.W.2d 45, 49 (Tex. App.—Texarkana 1987, writ denied)(defendant's alleged misrepresentation concerning expertise in purchasing of insurance not producing cause of damages as plaintiff did not rely on misrepresentations in purchasing insurance from company that later became insolvent).

19. Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988)(doctrine of merger not applicable).

20. Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 606 (Tex. App.— Tyler 1984, no writ).

21. Ojeda de Toca v. Wise, 748 S.W.2d 449, 450-51 (Tex. 1988) (discussing issue of notice under recording statutes).

22. Kennmore v. Bennett, 755 S.W.2d 89, 91 (Tex. 1988)(remedies not waived by mere acceptance).

23. A defendant may use evidentiary arguments to raise some common-law defenses. Falsity or deception concerning whether a seller will actually enter into an agreement, as opposed to falsity or deception concerning the terms of the agreement itself will not constitute a violation of the DTPA. *See* Freeman v. Greenbriar Homes, Inc., 715 S.W.2d 394, 396 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). The false assertion of rights or remedies constitutes a violation of the DTPA only when the assertion is made that the rights or remedies are conferred by the agreement between the parties. *See* Computer Business Serv., Inc. v. West. 627

The courts have allowed common-law defenses which relate to damages such as the right of offset,[24] compromise and settlement,[25] and mitigation of damages[26] because a plaintiff's recovery of "actual damages" under the DTPA is dependent upon the common-law rules relating to damages.[27] If the alleged violation of the DTPA is an act other than those defined by section 17.46 of the Act (the DTPA "laundry list"), common-law defenses that are not specifically precluded by the DTPA should be available to defendants.[28] Further, one appellate court has held that the above cases holding specific defenses to be unavailable should not be read as barring all common-law defenses in DTPA actions, but rather their holdings should be limited to the particular common-law defenses involved in each such case.[29] Collateral estoppel has been recognized as a defense in a DTPA suit for wrongful foreclosure,[30] and one cannot use the DTPA to accomplish that which is specifically barred by the statute of frauds.[31] Addi-

S.W.2d 759, 761 (Tex. App.—Tyler 1982, writ ref'd n.r.e.). Recovery for misrepresentations under the DTPA must be predicated on factual rather than interpretive misrepresentations of the agreement. *See* Group Hosp. v. One & Two Brookriver Center, 704 S.W.2d 886, 889 (Tex. App.—Dallas 1986, no writ). A defendant must have knowledge of facts before he is required to disclose them. *See* Brown Found. Repair & Consulting, Inc. v. Henderson, 719 S.W.2d 229, 231 (Tex. App.—Dallas 1986, no writ). Lastly, the courts have held that there is a presumption of fair and honest dealing which must be overcome by proof of the requisite intent. *See* *Freeman*, 715 S.W.2d at 397.

24. Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex. 1980), *cert. denied*, 449 U.S. 1015 (1981). This would include the defenses of compromise and settlement, *Cocke v. White*, 697 S.W.2d 739, 742 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), and the right to an offset already paid by settling co-defendant, *Lowe v. Royal Aviation Athletic Co., Inc.*, No. 01-85-0002CV (Tex. App.—Houston [1st Dist.] 1986, no writ).

25. *Cocke*, 697 S.W.2d at 742; Hernandez v. Telles, 663 S.W.2d 91, 93 (Tex. App.—El Paso 1983, no writ).

26. Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 924 (Tex. App.—Waco 1985, error dism'd).

27. *Brown*, 601 S.W.2d at 939 ("actual damages means those at common law"); Mercedes-Benz of North Am. v. Dickenson, 720 S.W.2d 844, 848 (Tex. App.—Fort Worth 1988, no writ); *see also* Farrell v. Hunt, 714 S.W.2d 298, 300 (Tex. 1986)(denied recovery to plaintiff for failure to prove damages under any common-law theory).

28. Jernigan v. Page, 662 S.W.2d 760, 762 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)(defense that recording statute is deemed to give notice to later purchases not precluded as defense to breach of warranty claim under DTPA).

29. Jenkins v. Steakley Bros. Chevrolet Co., 712 S.W.2d 587, 590 (Tex. App.—Waco 1986, no writ); Miranda v. Joe Myers Ford, Inc., 638 S.W.2d 36, 38-39 (Tex. App.—Houston [1st Dist.] 1982, writ dism'd)(finding without discussion whether defense available under DTPA that accord and satisfaction occurred between parties to DTPA action).

30. Metropolitan Sav. & Loan v. Tarter, 744 S.W.2d 926, 927-28 (Tex. 1988)(discussing collateral estoppel, res judicata, issue preclusion).

31. Keriotis v. Lombards Rental Trusts, 607 S.W.2d 44, 46 (Tex. Civ. App.—Beaumont

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tionally, common-law defenses in warranty actions brought under the DTPA may still be available because such actions often are brought pursuant to express or implied warranties already existing and recognized by other statutes or common law; the DTPA does not create any new warranties.[32] Lack of opportunity to cure[33] and actual cure of a defect before suit[34] precludes liability, but only if the defendant

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1980, writ ref'd n.r.e.)(relying on application of statute of frauds to claim alleging fraud in order to incorporate such defense to DTPA claim).

32. La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984). *But see* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987)(creates implied warranty to repair or modify existing tangible goods or property in good and workmanlike manner).

33. The defense of failure to comply with section 2.607 of the Texas Business and Commerce Code (the requirement that the buyer notify the seller of any breach of warranty so as to afford the seller an opportunity to correct the problem) has been held to bar recovery for breach of warranty under the DTPA. Miller v. Spencer, 732 S.W.2d 758, 760 (Tex. App.—Dallas 1987, no writ); Southwest Lincoln-Mercury, Inc. v. Ross, 580 S.W.2d 2, 5 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); Import Motors, Inc. v. Matthews, 557 S.W.2d 807, 809 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). Section 2.607 of the Texas Business and Commerce Code does not require that notice be given to the manufacturer or to anyone other than the immediate seller. Vintage Homes v. Coldiron, 585 S.W.2d 886, 889 (Tex. Civ. App.—El Paso 1977, no writ).

34. Ramsey v. General Motors Corp., 685 S.W.2d 15, 16 (Tex. 1985). However, a "business consumer" with assets of $5,000,000 or more that has "knowledge and experience in financial and business matters that enable it to evaluate the merits and risks of a transaction" and that is not in a "significantly disparate bargaining position" can execute a valid contractual waiver of its rights to invoke the DTPA (except for the right to sue for contribution or indemnity under section 17.555 of the Act). *Id.* This limited exception permitting contractual waivers of the DTPA's provisions by certain classes of business consumers applies only to contracts executed on or after August 29, 1983. TEX. BUS. & COM. CODE ANN. § 17.45(10) historical note (Vernon 1987). A "business consumer" is defined as an individual, partnership or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. This does not include the State of Texas or its governmental subdivisions or agencies. TEX. BUS. & COM. CODE ANN. § 17.45(10) (Vernon 1987). The following is a suggested DTPA waiver provision to be included when dealing with a business consumer:

BUSINESS CONSUMER DECLARATION

Borrower hereby waives the provisions of the Texas Deceptive Trade Practices - Consumer Protection Act and any relief or entitlements thereunder except as may be provided by section 17.555 of such Act.

Borrower hereby warrants and represents that (1) Borrower is a Business Consumer who is seeking or acquiring by purchase or lease goods or services for commercial or business use, (2) Borrower has assets of $5 million or more according to Borrower's most recent financial statement prepared in accordance with generally accepted accounting principles, and (3) Borrower has knowledge and experience in financial and business matters such that Borrower is able to evaluate the merits and risks of a transaction.

Notwithstanding any other provision in this note or in any other note, instrument, or document delivered pursuant hereto or in connection herewith, Lender and Borrower specifically waive any and all rights each has, or may have, to assert a claim with respect

has pled and proved such cure as an affirmative defense. Thus, a defendant who hopes to utilize a traditional common-law concept as a defense in DTPA litigation must couch the argument in the context of (i) a limitation on or determination of "damages," (ii) an element of a "warranty" claim, or (iii) a rule of evidence. Since common-law defenses generally do not apply in DTPA actions, the remainder of this Article will discuss some of the prelitigation drafting considerations that can reduce the impact of the DTPA and defenses and statutory exclusions available under the terms of the DTPA itself that allow a defendant to avoid the applicability of the Act. The subsequent discussion of these defenses will make apparent the movement in Texas law to exclude or constrict many of the original defenses raised to DTPA claims. The result is a statutory scheme which often creates absolute liability if the defendant's conduct is the producing cause of damages to a consumer.

II. Prelitigation Defensive Considerations

A. *Contractual Waivers of Warranty Claims*

One provision of the DTPA that vitiates the common-law and contract defenses normally available in litigation is section 17.42 which provides, in part, that consumers may not waive the protections of the DTPA, so that contractual waivers of deceptive trade practice claims are unenforceable.[35] Nevertheless, contractual disclaimers of either express warranties, or implied warranties arising by operation of law, may have useful defensive purposes even in the DTPA context.[36] One of the earlier cases suggesting this conclusion was the Texas Supreme Court's decision in *G-W-L, Inc. v. Robichaux*.[37] In *Robichaux*, a majority of the supreme court appeared to hold that contractual provi-

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to this note or any other agreement, instrument or document delivered pursuant hereto or in connection herewith, for any type of exemplary or punitive damages, or any multiplier of actual damages, available in equity or under statute of law.

35. Tex. Bus. & Com. Code Ann. § 17.42 (Vernon 1987).

36. The implied warranties most often the subject of contractual exclusion defenses, both because of the frequency in which they arise in litigation involving "goods," and because of the clear manner provided by statute for their contractual exclusion, are the implied warranties of merchantability and fitness for a particular purpose. Tex. Bus. & Com. Code Ann. §§ 2.314, 2.315 (Tex. UCC)(Vernon 1968). Both the existence of these warranties and the remedies for their breach may be limited or excluded in accordance with sections 2.316, 2.718 and 2.719 of the Texas Business and Commerce Code.

37. 643 S.W.2d 392 (Tex. 1982)(overruled in part by *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987)).

sions excluding warranty claims, at least those arising under implied warranties, would be upheld even when the plaintiff was seeking recovery under the DTPA. In *Robichaux*, the plaintiff alleged breaches of both express and implied warranties. The jury found that no express warranties had been breached, but also held that the defendant had failed to construct the roof of the home in issue in a good and workmanlike manner, so that the house was not merchantable at the time of completion.[38] The supreme court held that the contractual waiver in this case was sufficient to disclaim the implied warranties found by the jury to have been breached, so that the plaintiff could not recover.[39] Three justices dissented, saying that the contract waiver in issue was not sufficiently clear to be given effect.[40] Because no breach of an express warranty was found, the court did not directly address whether the disclaimer would also have provided an effective defense to that sort of DTPA claim. In addition, on appeal, both parties stipulated that implied warranties could be waived by proper contractual language, without questioning whether this would necessarily be true in suits alleging DTPA violations.[41]

In reliance upon *G-W-L, Inc. v. Robichaux*, a number of Texas courts have since held that contract provisions excluding warranty claims will be enforced in deceptive trade practice litigation. For example, in *Ellmer v. Delaware Mini-Computer Systems, Inc.*,[42] the Dallas Court of Appeals held that contractual disclaimers of any implied warranty of merchantability or fitness for a particular purpose that complied with the requirements of the Texas Business and Commerce Code were not rendered unenforceable by section 17.42 of the DTPA.[43] Accordingly, summary judgment in the seller's favor was upheld.[44] In *McCrea v. Cubilla Condominium Corp.*,[45] a contractual

38. *Id.* at 393.

39. *Id.* The contractual language in issue stated:

> This note, the aforesaid Mechanic's and Materialmen's Lien Contract and the plans and specification signed for identification by the parties hereto constitute the entire agreement between the parties hereto with reference to the erection of said improvements, there being no oral agreements, representations, conditions, warranties, express or implied, in addition to said written instruments.

Id. This holding would also appear to approve the doctrine of merger. *But see* Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988)(merger doctrine inapplicable).

40. *Robichaux*, 643 S.W.2d at 394-95.

41. *Id.* at 393.

42. 665 S.W.2d 158 (Tex. App.—Dallas 1983, no writ).

43. *Id.* at 160.

44. *Id.* at 161.

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disclaimer stating that the sale of a condominium was "without warranty from seller, express or implied" was held effective to waive claims under the DTPA for breaches of both express and implied warranties.[46] Somewhat confusingly, some Texas courts have acknowledged *Robichaux* but added that contractual waivers would not deprive a plaintiff of a DTPA cause of action for "misrepresentations," without defining the intended difference, if any, between a breach of an express warranty and a misrepresentation about the goods sold.[47]

On the other hand, other Texas courts have not considered the supreme court's decision in *Robichaux* to be controlling on this issue, stating that *Robichaux* never dealt directly with the fact that DTPA claims are distinctively different from traditional breach of contract or warranty claims, and that the supreme court never addressed the impact that the "no waiver" language of section 17.42 of the DTPA might have on attempts to contractually limit or exclude warranty liability in cases brought under the Act.[48]

The most logically consistent analysis of *Robichaux* and its implications for applying section 17.42 of the Act to contractual warranty disclaimers is found in *Singleton v. LaCoure*.[49] In *Singleton*, the Houston Court of Appeals clearly distinguishes between express and implied warranties, disclaimers of each, and the implications of section 17.42 of the DTPA in both situations. In *Singleton*, a trailer was sold accompanied by an invoice which contained conspicuous dis-

45. 685 S.W.2d 755 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

46. *Id.* at 757-58.

47. *See, e.g.*, UNL, Inc. v. Oak Hills Photo Finishing, Inc., 733 S.W.2d 402, 406 (Tex. App.—San Antonio 1987, no writ); Mercedes-Benz of North Am., Inc. v. Dickenson, 720 S.W.2d 844, 852 (Tex. App.—Fort Worth 1986, no writ); Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 789-90 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.). In *Davis*, the court's analysis is particularly arbitrary, holding that because the plaintiff simply invoked a cause of action for false representation rather than breach of warranty, the contractual waiver was ineffective, thus appearing to make the effectiveness of the contract provision a function of the pleader's art and nothing else. *Metro Ford*, 709 S.W.2d at 787, 789-90.

48. Martin v. Lou Poliquin Enters., Inc., 696 S.W.2d 180, 186 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)(*Robichaux* not controlling in suit for unspecified violations of DTPA in which defendant asserted contractual limits on liability); *see also* Reliance Universal, Inc. v. Sparks Indus. Serv., Inc., 688 S.W.2d 890, 892 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.). In *Reliance Universal*, the court held: "*G-W-L* was [a] breach of warranty case and we believe the Supreme Court's holding is limited only to that type of action, not to deceptive trade practice cases in general." *Id.*

49. 712 S.W.2d 757, 759 (Tex. App.—Houston [14th Dist.] 1986, no writ)(DTPA does not invalidate disclaimers of implied warranties valid under UCC).

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claimers that the vehicle was being sold "AS IS."[50] After finding this disclaimer sufficient to satisfy section 2.316 of the Texas Business and Commerce Code, the Houston court decided that whether *Robichaux* was controlling was not the issue.[51] Because section 17.42 only prohibits waivers of the provisions of the DTPA, it does not prohibit contractual waivers of implied warranties arising under other statutes. The court specifically noted that the DTPA itself creates no implied warranties;[52] when implied warranties are created under other statutory provisions, those statutes may also validly permit their disclaimer without contravening the legislative intent of section 17.42 of the DTPA.[53] The court also noted that section 17.46(b)(19) of the DTPA specifically provides that nothing in the DTPA shall be construed to expand the implied warranties arising under other subchapters of the Texas Business and Commerce Code to involve obligations in excess of those appropriate to the goods involved.[54] Finally, the court distinguished the case before it from one in which a claim might be made that an express warranty had been given that was inconsistent with a contractual disclaimer of warranties.[55] In such an event, section 2.316(a) of the Texas Business and Commerce Code would provide that such an inconsistent express warranty would prevail over the printed contract terms.[56] However, in this case, when only implied warranties were allegedly violated, the court decided that a contractual disclaimer of those warranties could be given effect without implicating section 17.42 of the DTPA in any way.[57]

From *Singleton v. LaCoure*, it is not difficult to extrapolate a fairly consistent set of guiding principles for deceptive trade practice litigation. It is clear that the DTPA, in and of itself, does not create any

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50. *Id.* at 758-59.

51. *Id.* at 759-60.

52. *Id.* at 760. *But see* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987)(implied warranty not created by DTPA but breach of same may be litigated if breached).

53. Singleton v. LaCoure, 712 S.W.2d 757, 760 (Tex. App.—Houston [14th Dist.] 1986, no writ)(DTPA waiver inapplicable to Section 2.316 of Texas Business and Commerce Code).

54. *Id.*

55. *Id.*

56. *Id.* Section 2.316(a) of the Texas Business and Commerce Code provides, in pertinent part: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction in unreasonable." TEX. BUS. & COM. CODE ANN. § 2.316(a) (Tex. UCC)(Vernon 1968).

57. *See Singleton*, 712 S.W.2d at 760.

implied warranties; any warranty enforceable under the DTPA must be independently created by some other statute or by the judiciary.[58] It, therefore, does not violate the anti-waiver provision of section 17.42 of the DTPA to limit or exclude implied warranties by contract, because this is not a waiver of the provisions of the DTPA.[59] Furthermore, to the extent that a consumer seeks to recover damages for breach of an express warranty that is in writing and not based upon an alleged oral warranty or warranty-like representation that became part of the transaction independently of the written contract materials, contract limitations or exclusions on express warranty recovery also should be enforceable. Again, the express warranty stems from the written contract between the parties and bargained-for limits or exclusions created in the same contract do not waive any right arising under the DTPA.[60] However, to the extent that a consumer seeks recovery for breach of an express warranty that arose independently from the contract documents themselves, making the action akin to one seeking recovery of damages for a misrepresentation or for breach of a promise that is inconsistent with any written contractual exclu-

58. *See* Cheney v. Parks, 605 S.W.2d 640, 642 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); Bunting v. Fodor, 586 S.W.2d 144, 145-46 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

59. Of course, there may be other restrictions on the extent to which implied warranties may be disclaimed or modified. In addition to the limitations imposed by the Texas Business and Commerce Code, other restrictions may be imposed by federal law. For example, the Magnuson-Moss Warranty Act prohibits a vendor from disclaiming or modifying implied warranties with respect to consumer products if a written warranty is offered with the sale of that product; however, written and implied warranties may be limited in duration if the limitation is conscionable and prominently displayed on the face of the warranty. 15 U.S.C. § 23.01 (1975).

60. The authors of a widely-used consumer litigation book suggest that because section 17.50(b) provides that a consumer who prevails under the DTPA may recover the actual damages found by the trier of fact, including litigation involving claims of breaches of express or implied warranties, it contravenes section 17.42 of the Act to uphold contractual limitations on the recoverable damages in suits alleging breaches of express or implied warranties. D. Bragg, P. Maxwell & J. Longley, Texas Consumer Litigation 143 (2d ed. 1983). However, where an express warranty is created solely by the written contract between the parties, it is illogical to say that such a contractual warranty could be excluded entirely but contractual definitions of its scope or applicability may not be lawfully created. Certainly such a result should be imposed through legislation that is more specific than the general anti-waiver provisions set forth in section 17.42 of the DTPA. Furthermore, a number of Texas courts have been willing to recognize the validity of limitations on remedies for suits involving breach of warranty claims, whether those warranties were express or implied, as long as independent misrepresentations or violations of the DTPA "laundry list" set forth in section 17.46 were not involved in the litigation. *See id.* at 12-13.

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sions or warranty limitations, section 17.42 of the Act probably will apply to preserve the consumer's cause of action.

The foregoing rules are not derived from *Robichaux*, but from *Singleton*. The continuing validity of *Robichaux* is somewhat clouded by the Texas Supreme Court's decision in *Melody Home Manufacturing Co. v. Barnes*.[61] In *Melody Home*, the Texas Supreme Court created an implied warranty that repairs or modifications of existing tangible goods or property for a consumer would be performed in a good and workmanlike manner.[62] Further, the supreme court reasoned that public policy required that this particular implied warranty could not be waived or disclaimed by contract, referring analogously to section 17.42 of the DTPA.[63] According to the supreme court, "[i]t would be incongruous if public policy required the creation of an implied warranty, yet allowed the warranty to be disclaimed and its protection eliminated merely by a pre-printed standard form disclaimer or an unintelligible merger clause."[64] Because the methods for disclaiming implied warranties of merchantability and fitness for a particular purpose are authorized by specific provisions of the Texas Business and Commerce Code, as are limitations on the remedies available in suits for breach of such implied warranties, the supreme court's rationale in *Melody Home* for prohibiting the disclaimer or limitation of the implied warranty created in that case, namely that permitting disclaimers or limitations would be violative of public policy, should not apply where the Texas legislature has authorized a different result.[65] Furthermore, the Texas Supreme Court in *Melody Home* emphasized its concern that disclaimers or limitations of implied warranties are often included in adhesion contracts offered to consumers on a take it or leave it basis by the stronger party in the transaction.[66] To the extent that implied warranties are disclaimed or limited by contract in transactions between merchants or commercially sophisticated entities of relatively equal bargaining power, the same public policy con-

61. 741 S.W.2d 349 (Tex. 1987).

62. *Id.* at 354. "Good and workmanlike" 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." *Id.*

63. *Id.* at 355.

64. *Id.*

65. *Id.*

66. *Id.*

sideration would not appear to exist, thus possibly permitting the creation of valid contractual limitations or waivers of implied warranties in addition to the limitations and exclusions of such warranties specifically authorized by the Texas Business and Commerce Code.

Although it cannot be said that contractual exclusions or limitations of express or implied warranties are generally enforceable in the realm of deceptive trade practice litigation, such contractual provisions still retain some usefulness. A vendor who is selling or leasing goods or services is well advised to consider continuing to employ such contract defenses. Particularly with respect to the implied warranties arising under Chapter 2 of the Texas Business and Commerce Code, such contractual exclusions and limitations should retain their vitality if deceptive trade practice litigation is later filed.[67]

B. *Contractual Limits on Remedies and Damages*

To a large degree, discussion of the continued validity of contractual provisions either limiting remedies for breach of warranty or contract or providing for liquidated damages in the event litigation is filed parallels the foregoing discussion on warranty exclusion or definition. Traditionally, contracting parties in Texas have generally been permitted to limit their liability to specified amounts or to limit the remedies available for breach of contract absent a controlling public policy to the contrary.[68] When confronted with suits involving DTPA allegations, Texas courts have nevertheless often permitted the enforcement of such contractual limitations on available damages when a consumer's complaint was essentially one for breach of an express or implied warranty. However, when the action brought was essentially one for misrepresentation, particularly in violation of section 17.46 of the DTPA, contractual provisions limiting damages or available remedies have generally been held to violate section 17.42 of the DTPA.[69]

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67. Lending institutions should also consider requiring a DTPA Business Consumer Declaration and Waiver be executed by each appropriate customer.

68. *See* Vallance & Co. v. DeAnda, 595 S.W.2d 587, 590 (Tex. Civ. App.—San Antonio 1980, no writ)(burglar alarm company permitted to contractually limit liability for breach of burglar alarm service contract); *see also* W.R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76, 80-81 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.)(contractual waiver of all damages, direct or consequential, and contractual provision limiting remedy for breach to exchange of equipment enforced in suit alleging breaches of express and implied warranties).

69. The seminal case in this area is *Rinehart v. Sonitrol of Dallas, Inc.*, 620 S.W.2d 660 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). In *Rinehart*, the court upheld enforcement of a liquidated damages provision limiting recovery for breach of an express contractual warranty

C. *Contractual Arbitration Provisions*

Although not a substantive defense to DTPA liability, as a practical matter, a defendant's power to compel binding arbitration of a claim under the Act can be critically helpful in reducing potential exposure to the substantial liability that might otherwise be faced in a jury trial. Once again, an initial consideration must be whether sec-

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to $5,000, because the plaintiff's only claim that a violation of the Texas DTPA had occurred was based upon a claim that the express contractual warranty had been breached. *Id.* at 663. The court decided that one could not sue to recover under a specific, express contractual warranty, thus asserting benefits under the contract, and yet repudiate contractual limitations on actual damages for breach of that same warranty. *Id.* at 663. However, the Dallas court did apply the treble damage penalty that at the time was mandatory under section 17.50(b) of the applicable version of the DTPA, reasoning that this treble damage penalty was not a "contractual liability" to which the contract limitation would apply. *Id.* at 663. In *Eppler, Guerin & Turner, Inc. v. Purolator Armored, Inc.*, 701 S.W.2d 293 (Tex. App.—Dallas 1985, no writ), the Dallas court went even further. In *Eppler*, the plaintiff claimed that a delivery schedule attached to the written contract and a telephone conversation with Purolator constituted representations that the delivery in issue would be in accordance with the August 1982 Purolator delivery schedule. *Id.* at 294. When delivery of the plaintiff's securities was delayed, suit was filed to recover for violations of the section 17.46(b)(5) of the DTPA (representing that services have characteristics, uses or benefits which they do not). *Id.* Because *Purolator* excluded liability for any loss caused by delay, and because of a variety of other factors which seemed to indicate that no unique representations or promises concerning delivery had been made to the plaintiff, the court found that section 17.42 of the DTPA did not invalidate this contractual limitation on liability, even though the plaintiff had sued for violations of the laundry list and had alleged misrepresentations rather than breaches of warranty. *Id.* at 296-97. Other Texas courts have been willing to go so far. In *Reliance Universal, Inc. v. Sparks Industrial Services, Inc.*, 688 S.W.2d 890 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.), a suit alleging both breaches of implied warranties and misrepresentations of the quality of goods sold, the court held that a contractual limitation on recoverable damages to a return of the purchase price was not a defense to a suit for alleged misrepresentations violating section 17.46 of the DTPA. *Id.* at 891. The court did indicate that if the plaintiff's allegations had solely been for breach of contract or warranty, the argument that the contractual limitation on liability should control would have been "somewhat persuasive." *Id.* at 893. In *Hycel, Inc. v. Wittstruck*, 690 S.W.2d 914 (Tex. App.—Waco 1985, error dism'd), a contractual provision limiting a buyer's remedies to repair or replacement of defective warranted parts and excluding recovery of consequential damages was held to be simply unenforceable in a suit involving DTPA allegations. *Id.* at 923. A liquidated damages clause limiting recovery to a refund of the specified contract deposit was also held unenforceable. *Id.* In *Hycel*, the jury did find several violations of section 17.46(b) of the Act, including misrepresentations as to the product's characteristics, uses or benefits. *Id.* In *Martin v. Lou Poliquin Enterprises, Inc.*, 696 S.W.2d 180 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.), contractual limitations on liability restricting recovery for failure to publish items of advertising to the charges for publication were held unenforceable in an action for violations of the DTPA. *See id.* at 185-86. The *Martin* court did not state how the plaintiff claimed that the DTPA had been violated, but there was evidence of specific oral assurances that plaintiff's advertisement would appear in the 1980 Houston yellow pages. *See id.* at 187.

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tion 17.42 of the DTPA will be applied to void an agreement to submit DTPA claims to binding arbitration. To date, no Texas state court decisions have answered this question. However, a number of federal courts have held that, at least with respect to arbitration under the Federal Arbitration Act,[70] section 17.42 of the DTPA is no bar. Most significant are two decisions to this effect by the United States Court of Appeals for the Fifth Circuit.

In *Commerce Park at DFW Freeport v. Mardian Construction*,[71] a Texas partnership and a general contractor contracted to build an office-warehouse project.[72] Subsequently, the partnership rejected all of the contractor's paving and curb work.[73] The contractor demanded arbitration as was stipulated by the parties' contract and the partnership resisted, claiming damages under the DTPA and invoking section 17.42 of the DTPA as a bar to arbitration.[74] Upon appeal, the Fifth Circuit affirmed the lower court's order staying all proceedings pending arbitration.[75] Holding that section 2 of the Federal Arbitration Act declared a national policy in favor of arbitration,[76] the Fifth Circuit concluded that under the supremacy clause, state law could not abrogate federal law.[77]

In *Ommani v. Doctor's Associates, Inc.*,[78] franchisees dissatisfied with their inability to obtain a satisfactory franchise location and having other complaints against their franchisor filed suit alleging breaches of contract, negligence, fraud, and violations of the DTPA.[79] The franchisor filed a timely demand for arbitration and the district court stayed appellants' lawsuit pending arbitration under the Federal Arbitration Act.[80] Upon appeal, the Fifth Circuit held that although appellants' claims were based in part on allegations of unconscionabil-

70. 9 U.S.C. §§ 1-208 (1987).

71. 729 F.2d 334 (5th Cir. 1984).

72. *Id.* at 336.

73. *Id.*

74. *Id.*

75. *Id.* at 342.

76. 9 U.S.C. § 2 (1987) provides, in pertinent part: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable . . . ."

77. Commerce Park at DFW Freeport v. Mardian Constr., 729 F.2d 334, 338 (5th Cir. 1984).

78. 789 F.2d 298 (5th Cir. 1986).

79. *See id.* at 298-99.

80. *Id.* at 299.

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ity in violation of the DTPA, the federal policy in favor of arbitration preempted any claim that the state statutory claims were not arbitrable.[81] Federal district courts in Texas have reached the same conclusion.[82]

Both *Mardian Construction Co.* and *Ommani* were decided on the basis of the federal policies underlying the Federal Arbitration Act.[83]

81. *Id.* at 299-300 (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984))(holding that Federal Arbitration Act pre-empted claim that causes of action arising under California franchise investment law not arbitrable).

82. *See* Beckham v. William Bayley Co., 655 F. Supp. 288, 290 n.2 (N.D. Tex. 1987). However, in *Beckham*, neither party claimed that the presence of a deceptive trade practice act claim should affect the decision to arbitrate. *Id.* In *Beckham*, the deceptive trade practice claim involved allegations of breach of warranty and knowingly furnishing goods not of the standard or grade required to produce the result desired. *Id.* at 290. Ultimately, the court in *Beckham* decided that the contractual provision in question did not require arbitration because it merely evidenced intent to refer controversies over the intent of the contract to arbitration. *Id.*; *see also* Marley v. Drexel Burnham Lambert, Inc., 566 F. Supp. 333 (N.D. Tex. 1983).

83. Carpenter v. North River Ins. Co., 426 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). One drafting an arbitration paragraph should be very careful to include sufficient stipulation to invoke the applicability of the Federal Arbitration Act. The following is an arbitration clause utilized by a lending institution which clearly falls within the purview of the Federal Arbitration Act:

ARBITRATION

The parties further agree as follows:

(a) Any controversy between the Parties and Lender arising out of or relating to this note, shall be settled by arbitration in accordance with the Commercial Arbitration Rules, then obtaining, of the American Arbitration Association. Any arbitration hereunder shall be before at least three arbitrators selected in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

(b) Arbitrable disputes include any controversy or claim between the Parties and Lender including any claim based on contract, tort, or statute, arising out of or relating to the transaction evidenced by this note or any other proposed or actual loan or extension of credit, all past, present and future agreements involving the parties, any transaction contemplated hereby, and any aspect of the past, present or future relationship of the parties. Depositions may be taken and other discovery obtained in any arbitration under this agreement.

(c) For purposes of this provision, "the Parties" means Borrower, and each of them, and all persons and entities signing any of the other agreements, security instruments, and/or guarantees heretofore executed or executed contemporaneously with and as part of the same transaction with this note. "The Parties" shall also include individual officers and employees of the signators of those documents.

(d) All parties hereto shall have the right to invoke self-help remedies (such as set-off, notification of account debtors, seizure and/or foreclosure of collateral, and nonjudicial sale of property and real property collateral) and/or ancillary or provisional judicial remedies (such as garnishment, attachment, specific performance, receiver, injunction or restraining order, and sequestration) before, during, or after any arbitration. Lender need

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To date, no Texas court has decided whether the policies underlying the DTPA should be applied to bar enforceable state arbitration of DTPA claims. Although no Texas case has explicitly decided whether section 17.42 precludes a reference to arbitration of DTPA claims, there are significant state public policy reasons why this should not be the case. Although arbitration has been traditionally favored in Texas, until recently, an agreement to submit a matter to arbitration under common law could be revoked by either party at any time before an award was made.[84] In 1977, however, the Texas Supreme Court, in dicta in *L.H. Lacy Co. v. City of Lubbock*,[85] delivered a strong policy statement in support of arbitration, in the course of upholding an arbitration award under common law.[86] Although

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not await the outcome of the arbitration before using self-help or provisional remedies. Use of self-help or ancillary and/or provisional remedies shall not operate as a waiver of either party's right to compel arbitration.

(e) Any aggrieved party shall serve a written demand for arbitration to any opposing parties and an American Arbitration Association office within the State of Texas within 45 days after dispute has arisen. A dispute is deemed to have arisen upon receipt of a written demand or service of judicial process. Failure to serve a demand for arbitration within the time specified above shall be deemed a waiver of the aggrieved party's right to compel arbitration of such claim.

(f) Any arbitrators selected shall be knowledgeable in the subject matter of the dispute. Qualified retired judges shall be selected through panels maintained by the American Arbitration Association. Each of Borrower(s) and Lender shall pay an equal share of the arbitrators' fees.

(g) All statutes of limitations which would otherwise be applicable shall apply to any arbitration proceeding hereunder. In any arbitration proceeding subject to these provisions, the arbitrators, or a majority of them, are specifically empowered to decide (by documents only, or with a hearing, at the arbitrators' sole discretion) pre-hearing motions which are substantially similar to pre-hearing motions to dismiss and motions for summary adjudication.

(h) The provisions of this section shall survive any termination, amendment, or expiration of the agreement in which this section is contained, unless all parties otherwise expressly agree in writing.

(i) The parties acknowledge that this note evidences a transaction involving interstate commerce in that loan funds provided under this note are derived from interstate financial markets. The Federal Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this note.

(j) The arbitrators, or a majority of them, shall award attorney's fees and costs pursuant to the terms of this agreement to the prevailing party.

(k) Venue of any arbitration proceeding hereunder shall be in Bexar County, Texas.

84. *Carpenter*, 436 S.W.2d at 551.

85. 559 S.W.2d 348 (Tex. 1977).

86. *Id.* at 348, 351-53. In *Lacy*, the supreme court merely held that when both parties had participated in common-law arbitration proceedings and neither had unequivocally withdrawn its consent to arbitrate before an award was issued, the award would be enforceable

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stating that its function was not to extend the role of arbitration,[87] the supreme court noted that traditional common-law policies underlying refusal to specifically enforce agreements to arbitrate future disputes had been more important in an earlier age, based on public policy weighed against allowing private persons to oust the courts of jurisdiction, and when the heavy load borne by court dockets and the concomitant congestion had not become the problem that it now is.[88]

In reliance upon *Lacy*, a number of appellate courts in Texas began abrogating the traditional rule precluding specific enforcement of future agreements to arbitrate.[89] Further, in 1983, the Texas legislature amended the Texas General Arbitration Act to make specific enforcement of certain executory arbitration agreements a matter of statutory law.[90] Increasingly, it is evident that the policies supporting arbitration of disputes are becoming more and more imperative, while the reasons for not submitting disputes of any kind to arbitration are less and less significant. For these reasons, any Texas court faced with a claim that DTPA causes of action are not subject to arbitration because of the policy underlying the DTPA should not uphold such a contention. As previously noted, with certain exceptions, section 17.42 of the DTPA provides that any waiver by a consumer of the provisions of the DTPA is contrary to public policy and "unenforceable and void."[91] However, arguably nothing in the DTPA would

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under common law. *Id.* Lacy did not involve arbitration under the Texas General Arbitration Act.

87. *Id.* at 352.

88. *Id.* The court added:

> In addition to alleviating some measure of the burden on the courts, arbitration in a commercial context is a valuable tool which provides business people, and all citizens, with greater flexibility, efficiency and privacy . . . while it is unnecessary in this case to alter common law arbitration rules, the policy of refusing specific enforcement to executory arbitration agreements is not justifiable when the case fits within the common mold.

Id.

89. *See, e.g.*, Olshan Demolishing Co. v. Angelton Indep. School Dist., 684 S.W.2d 179, 184 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); Gerdes v. Tygrett, 584 S.W.2d 350, 352 (Tex. Civ. App.—Texarkana 1979, no writ).

90. TEX. REV. CIV. STAT. ANN. art. 238-20, §§ 1-2 (Vernon Supp. 1988). Texas has traditionally recognized both common-law and statutory arbitration proceedings, and passage of the Texas General Arbitration Act did not affect the availability of common-law arbitration. Further, an agreement to arbitrate that may not be enforceable by statute may still permit arbitration at common law. *See* Carpenter v. North River Ins. Co., 436 S.W.2d 549, 551-53 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Ferguson v. Ferguson, 93 S.W.2d 513, 516 (Tex. Civ. App.—Amarillo 1936, no writ).

91. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987).

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prevent selection of binding arbitration as the forum for enforcement of DTPA claims, and such selection would not be tantamount to a surrender of any rights under any specific provision in the DTPA itself.[92] The DTPA itself is to be liberally construed and applied to promote its underlying purposes, which are to protect consumers against violations of the Act and "to provide efficient and economical procedures to secure such protection."[93] For a defendant faced with DTPA claims, the advantages of arbitration include the finality that is now available with respect to the arbitrator's conclusions; the expertise that arbitrators can bring to commercial disputes, thus reducing the possibility that they will be swayed by sympathy or prejudice; the privacy that arbitration affords, reducing the chances of adverse publicity that might encourage other litigation; and reduction of the possibility of an unreasonably large award of either actual or additional damages. In addition, agreements to submit to binding arbitration may discourage nuisance claims and suits.[94] For consumers, arbitration of disputes offers speed, economy, and the encouragement of reasonable settlements of bona fide claims. Given these benefits, some care should be devoted to drafting arbitration agreements and in deciding whether to proceed under the Federal Arbitration Act or the Texas General Arbitration Act.[95]

Whether a contract's arbitration clause requires arbitration of a given dispute is a matter of contract interpretation, and arbitration clauses are to be construed liberally in favor of arbitration.[96] When

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92. The DTPA provides that a consumer who has suffered actual damages because of a violation of the Act or because of a breach of an express or implied warranty may "maintain an action" for recovery of actual damages in a "suit filed under this section." TEX. BUS. & COM. CODE ANN. § 17.50(a),(b) (Vernon 1987). In general, the language employed in section 17.50 concerning the remedies available to consumers who prevail, including repeated references to various findings by the court and to court costs, would appear to contemplate judicial proceedings. However, recovery of identical elements of damages and analogous recoveries of costs would be available in arbitration, so that a requirement of arbitration of a deceptive trade practice act claim would not result in the consumer's having waived the relief provided for in the DTPA.

93. *Id.* § 17.42. If the DTPA is applied to promote the use of efficient and economical procedures for the resolution of disputes, then it clearly is not inconsistent with arbitration.

94. *See* David S. Rubsamen, U.S. Department of Health, Education and Welfare, Secretary's Commission on Medical Malpractice, "The Experience of Binding Arbitration in the Ross-Loss Medical Group," January 16, 1973.

95. *See* Ommani v. Doctor's Assocs., Inc., 789 F.2d 298, 299 (5th Cir. 1986)(discussing Federal Arbitration Act).

96. Beckham v. William Bayley Co., 655 F. Supp. 288, 290 (N.D. Tex. 1987).

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an arbitration provision is drafted using standard, broad language, as a general rule, the courts will defer to arbitration of all matters involving contract interpretation or claims for breach.[97] In order to insure that all disputes that might arise in connection with a commercial transaction, including possible allegations of unconscionable conduct or other tort-like violations of the DTPA, agreements to arbitrate that are intended to include allegations of violations of the DTPA should be drafted as broadly as possible so as to include all disputes arising out of the transaction or the dealings between the parties.[98]

In addition, to the extent possible, the party intending to apply for arbitration in the event of a commercial dispute for DTPA claims should provide that the parties intend to seek federal statutory arbitration, not arbitration under the Texas General Arbitration Act.[99] This provision is preferable for a number of reasons. First, as noted above, the only cases to date holding that DTPA claims are subject to arbitration have been federal decisions relying upon the preemption of state law by the Federal Arbitration Act.[100] Until the Texas courts, and preferably the Texas Supreme Court, has also held that DTPA claims are subject to arbitration without violation of the public policy established by section 17.42 of the DTPA, only federal statutory arbitration is known to be available as a matter of certainty. Second, the Texas General Arbitration Act excludes a variety of types of contracts from the scope of its provisions, including any contract under which an individual seeks to acquire personal property or services or money or credit for less than $50,000, and any claim for personal injuries,

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97. *Id.* at 291. An example of a standard broad contract arbitration clause is as follows:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the commercial arbitration rules of the American Arbitration Association, and a judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Id. (citing Hoellering, *Arbitrability of Disputes*, 41 THE BUSINESS LAWYER 125 (Nov. 1985)). In *Beckham*, because the parties prepared an arbitration provision providing only that all disagreements concerning the intent of the contract would be arbitrated, a dispute involving contract performance was held not subject to arbitration. *Id.* at 291-92.

98. *See* Central Texas Clark Lift, Inc. v. Simmons, 540 S.W.2d 745, 747 (Tex. Civ. App.—Waco 1976, no writ)(claims of willful and malicious interference with contract not dispute "relating to contract of sale" not within terms of parties' arbitration agreement and court would have jurisdiction).

99. *See* Ommani v. Doctor's Assocs., Inc. 789 F.2d 298, 299 (5th Cir. 1986)(discussing Federal Arbitration Act).

100. *See id.*; *see also* Beckham v. William Bayley Co., 655 F. Supp. 288, 290 (N.D. Tex. 1987)(discussing federal policies underlying Federal Arbitration Act).

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unless such agreements are reduced to writing in advance and signed by the attorneys for the parties to the contract.[101] In addition, Texas courts are instructed to refuse to enforce a statutory arbitration if the court finds that the agreement to arbitrate was "unconscionable at the time the agreement or contract was made."[102] The Federal Arbitration Act does not condition enforcement of the agreement to arbitrate on a finding by the court that the agreement was not unconscionable when made, nor does it exclude the types of contracts listed in Article 224 of the Texas General Arbitration Act.[103] Third, a body of precedent exists interpreting the Federal Arbitration Act so that certain issues have been clarified which have not arisen under the Texas General Arbitration Act. For example, both the Federal and the Texas Arbitration Acts provide that written agreements to arbitrate are enforceable and irrevocable "save upon such grounds as exist at law or in equity for the revocation of any contract."[104] There is little Texas authority interpreting this language. However, there is ample federal authority addressing this issue, including a decision holding that when the party seeking to avoid arbitration claims that the contract was fraudulently induced, this does not prevent statutory arbitration as long as the arbitration provision in the contract itself was not agreed to because of fraud.[105]

Virtually the only significant condition or threshold to be met before arbitration under the Federal Arbitration Act becomes available is the requirement that the contract or dispute to be arbitrated must involve the transaction "involving commerce."[106] The Federal Arbitration Act defines commerce as:

> commerce among the several States or with foreign nations, or in any

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101. TEX. REV. CIV. STAT. ANN. art. 224 (Vernon Supp. 1988).

102. *Id.*

103. 9 U.S.C. § 1 (1987). However, for federal arbitration to apply, the contract must evidence a transaction "involving commerce." 9 U.S.C. § 2 (1987). The implications of this requirement are discussed below.

104. 9 U.S.C. § 2 (1987); TEX. REV. CIV. STAT. ANN. art. 224 (Vernon Supp. 1988).

105. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967)(claim of fraud in inducement may be issue for arbitration).

106. A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1987).

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> Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . .[107]

Whether a transaction involves "commerce" is sometimes difficult to predict since court decisions in this area are not uniform. However, commercial transactions in which the principals to the contract or their agents actually cross state lines are often held to involve "commerce" for the purposes of arbitration,[108] as are transactions which generate significant activity affecting commerce in more than one state.[109]

III. STATUTORY DEFENSES

A. *Defenses Related to Plaintiff's Status as "Consumer"*

The DTPA does not provide relief for everyone who may have been aggrieved by deceptive trade practices. Instead, the DTPA only provides protection for those persons considered "consumers."[110] The Act defines "consumer" as:

> 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 con-

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107. *Id.* § 1. This definition makes the Federal Arbitration Act virtually coextensive with the commerce clause under the United States Constitution.

108. *See* Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 243 (5th Cir. 1986)(contract involving sale of royalty gas owned, produced, transported and sold in Louisiana involved "commerce" where seller's general partners were Texas citizens operating in Louisiana and sent personnel from Texas and received payments in Texas); Standard Fire Ins. Co. v. Fraiman, 514 S.W.2d 343, 347 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ)(employment contract between employer headquartered in New York and employee selling goods from Massachusetts in five states governed by Federal Arbitration Act).

109. *See* Masthead M.A.C. Drilling Corp. v. Fleck, 549 F. Supp. 854, 855-56 (S.D.N.Y. 1982)(sale of limited partnership interests in New York created joint venture agreement involving interstate commerce, although all drilling operations occurred only in Texas); Blanks v. Mid-State Constructors, Inc., 610 S.W.2d 220, 224 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.)(construction of hospital in Texas involved commerce because of purchases of materials and supplies and transportation of personnel from other states, although both parties to contract were Texas residents). *Contra* Withers-Busby Group v. Surety Indus., Inc., 538 S.W.2d 198, 199 (Tex. Civ. App.—Dallas 1976, no writ)(joint venture agreement signed by two Texas residents with principal place of business in Texas did not involve "commerce" for purposes of arbitration, although nationwide business contemplated by parties to contract).

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

trolled by a corporation or entity with assets of $25 million or more.[111]

The Texas Supreme Court has repeatedly ruled that only consumers have standing to assert a claim under the DTPA.[112]

> The [DTPA] thus differentiates between the remedies available to correct violations of the Act. A "person" may have engaged in a deceptive act by presenting any misleading information concerning any item of value. . . . Any person engaging in such deceptive practices may be subjected to a suit by the Consumer Protection Division of the Attorney General's Office, under section 17.47. But, one who engages in deceptive acts may not be subjected to a private suit for damages under the Act unless the aggrieved party is a consumer. Section 17.50 expressly declares, in its caption: Relief for Consumers. Furthermore, section 17.50 provides that a consumer may maintain a cause of action if aggrieved by deceptive practices. The Legislature granted no such remedy by means of a private cause of action for any person; one must be a consumer.
>
> . . .
>
> [I]t is the definition of consumer that delineates the class of persons that may maintain a private cause of action. Second, the rule of liberal interpretation should not be applied in a manner that negates the statutory definition of the word "consumer." To ignore the Legislature's definition of "consumer," and permit any aggrieved person to maintain a private cause of action under the DTPA, ignores the well established presumption that legislative choice of words is such that every word has meaning. . . . Thus, [the Texas Supreme Court] hold[s] that a person who brings a private lawsuit under section 17.50 must be a consumer, as defined in section 17.45(4). The other courts that have considered this issue have been in accord. . . .[113]

Further, the legislature's instruction that the DTPA should be liberally construed is not applicable to the issue of consumer standing.[114]

Whether a plaintiff is a consumer under the DTPA is a question of

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111. *Id.* § 17.45(4). The definition of consumer has been amended on three separate occasions by the legislature. Originally, it did not include corporations or state agencies. The earlier amendments broaden the standing threshold, but the 1983 amendments restricted potential consumers by placing an economic size limitation for the first time.

112. *See, e.g.*, Sherman Simon Enter. v. Lorac Serv. Corp., 724 S.W.2d 13, 15 (Tex. 1987); La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 564 (Tex. 1984); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 706 (Tex. 1983); Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 388 (Tex. 1982); Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 173 (Tex. 1980).

113. *Riverside Nat'l Bank*, 603 S.W.2d at 173 (cited cases omitted).

114. *Id.* (rule of liberal interpretation not applied in manner negating statutory definition

law to be determined from the evidence presented.[115] The plaintiff has the burden of proving status as a consumer,[116] but the defendant has the burden of proving by special exception that the plaintiff falls within a category of excepted businesses who are within the scope of the definition of a "consumer" but are still precluded from seeking the damages authorized by the DTPA.[117]

The Texas Supreme Court has developed a two-prong test for interpreting the consumer requirement, requiring first, the person must have sought or acquired goods or services by purchase or lease and second, the goods or services must form the basis of the complaint.[118]

1. "Seeks" or "Acquires"

The consumer definition presents two alternatives relating to the purchase or lease of goods or services. The consumer must either "seek" or "acquire" the goods or services. "Seek" implies, and the courts hold, that an actual sale need not be consummated.[119] A plaintiff does not "seek" goods or services, however, if the purchase is negotiated by someone else without the plaintiff's input.[120] Third parties can still have consumer status, however, if they have "acquired" goods or services even if they are purchased or leased by

of consumer). A DTPA claimant must be expressly delineated in the consumer definition or he or she lacks consumer standing. *Id.*

115. Netterville v. Interfirst Bank, 718 S.W.2d 921, 922 (Tex. App.—Beaumont 1986, no writ).

116. River Oaks Townhomes Owners' Ass'n v. Bunt, 712 S.W.2d 529, 531 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

117. Challenge Transp., Inc. v. J-Gem Transp., Inc., 717 S.W.2d 115, 117 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). *Challenge Transportation* was expressly disapproved in *Eckman v. Centennial Savings Bank*, 32 Tex. Sup. Ct. J. 46, 47-48 (Oct. 26, 1988)(defendant must raise $25,000,000 asset exemption by special exception and hearing followed by in camera inspection of evidence by trial court). If the trial court finds a genuine issue of fact exists, only then is the plaintiff required to secure a determination that he is not a business consumer by the finder of fact. *Id.* at 48.

118. Sherman Simon Enter. v. Lorac Serv. Corp., 724 S.W.2d 13, 15 (Tex. 1987).

119. *See, e.g., Id.* (no importance to plaintiff's consumer status that rental fee never paid); March v. Thiery, 729 S.W.2d 889, 896 (Tex. App.—Corpus Christi 1987, no writ)(person not considered consumer with respect to property acquired through inheritance); Dixon Distrib. Co. v. LeJune, 662 S.W.2d 693, 695 (Tex. App.—Houston [14th Dist.] 1983, no writ)(plaintiff is consumer even though never paid for repairs). Although a transfer of consideration is not a prerequisite to achieve consumer status, a plaintiff must have presented himself to a seller in good faith with the subjective intent or specific objective of purchasing, and must have the credible capacity to consummate the transaction. Martin v. Lou Poliquin Enters., Inc., 696 S.W.2d 180, 184-85 (Tex. App.—Houston [14th Dist.] 1985, no writ).

120. Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex. 1985).

someone else for the third party's benefit.[121]

2. Goods or Services

"Goods" are defined under the Act as "tangible chattels or real property purchased or leased for use."[122] By its express terms, "goods" do not include intangibles. Accordingly, plaintiffs have been held not to be consumers when suit is brought for the sale of securities[123] or certificates of deposit.[124] In many circumstances, however, where the plaintiff seeks or acquires an intangible, the courts have upheld consumer status because the plaintiff sought "services" collateral to the intangible.[125]

A substantial amount of litigation under the DTPA has concerned the circumstances under which lenders may be sued under the DTPA. Initially, the Texas Supreme Court held that since money is not a tangible chattel, it was excluded from the definition of goods. Therefore, a person seeking a loan of money to refinance a car was held not to be a "consumer."[126] Subsequent court opinions, however, have allowed borrowers to sue in instances where the loan is sought for the purchase of goods or services[127] or the plaintiff was seeking services

121. *Id.* (plaintiff held to have "acquired" health insurance benefits actually purchased by employer for DTPA consumer standing purposes).

122. TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon 1987).

123. Swenson v. Engelstad, 626 F.2d 421, 428 (5th Cir. 1980); Portland Sav. & Loan Ass'n v. Bevill, 619 S.W.2d 241, 245 (Tex. Civ. App.—Corpus Christi 1981, no writ). The Texas Supreme Court recently avoided addressing this issue in a case-on-point by holding that the defendant waived the defense by not presenting it to the trial court. E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987).

124. Grass v. Credito Mexicano, S.A., 797 F.2d 220, 222 (5th Cir. 1986). While the Fifth Circuit holds that the mere purchase of a certificate of deposit is not a purchase of goods or services under the DTPA, the court does present the possibility of services provided in connection with the certificate of deposit purchase as forming the basis of a DTPA action. *Id.*; *see also* First Fed. Sav. & Loan Ass'n v. Ritenour, 704 S.W.2d 895, 899-900 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.)(use of bank's financial counseling services acquired in purchase of certificate of deposit).

125. *See* Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873, 877 (Tex. App.—Corpus Christi 1988, writ ref'd n.r.e.)(plaintiff could sue under DTPA concerning franchise rights where transaction involved purchase of collateral services from defendant).

126. Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 174 (Tex. 1980). The court also held that loaning of money was not a "service" under the DTPA. *Id.* at 174-76.

127. *See* Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 388-89 (Tex. 1982)(borrower was consumer where loan used for purchase of truck); Irizarry v. Amarillo Pantex Fed. Credit Union, 695 S.W.2d 91, 92-93 (Tex. App.—Amarillo 1985, no writ)(borrower was consumer where loan sought for purchase of car).

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from the lender collateral to the loaning of money.[128]

3. Goods or Services Must Form Basis of Complaint

The second requirement imposed by the Texas Supreme Court is that the goods or services must be the basis of the plaintiff's complaint.[129] In *Chastain v. Koonce*,[130] the court held that the purchasers of real estate were consumers under the second prong of the test even though they were not complaining about the lots which they had purchased. Rather, the complaint was about how adjoining lots were used in violation of the seller's representation that the adjoining lots would be restricted for residential use only.[131] The misrepresentation or other act complained of must have some connection with the transaction in question. For example, a plaintiff who bought a house did not have a cause of action under the DTPA against the previous owner of the house for alleged misrepresentations made by the previous owner to a previous buyer, because those misrepresentations were not made in connection with the plaintiff's purchase of the house.[132]

4. Producing Cause

The terms "producing cause" and "natural result" are synonymous.[133] "Producing cause" has been defined as an efficient, exciting or contributing cause[134] that, in a natural sequence, produces injuries

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128. Juarez v. Bank of Austin, 659 S.W.2d 139, 142 (Tex. App.—Austin 1983, writ ref'd n.r.e.)(bank's service of providing credit insurance in connection with loan actionable under DTPA); Fortner v. Fannin Bank In Windom, 634 S.W.2d 74, 75-76 (Tex. App.—Austin 1982, no writ)(bank's promise to file title papers on borrower's automobile was service). The bank's unconscionable conduct in foreclosing on a residence may be actionable under the DTPA even though the bank obtained the deed of trust lien by assignment subsequent to the date the residence was purchased by the plaintiffs. *See* Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 706-08 (Tex. 1983). A guarantor may be a consumer with respect to a lender's agreement concerning disbursement of loan proceeds, escrow and depository services, supervision of principal debtor's credit and protection of other guarantor's credit. *See* Federal Deposit Ins. Corp. v. Munn, 804 F.2d 860, 866 (5th Cir. 1986)(facts presented jury question of guarantor status as consumer).

129. Chastain v. Koonce, 700 S.W.2d 579, 581 (Tex. 1985).

130. *Id.*

131. *Id.* at 580-81.

132. Taylor v. Burke, 722 S.W.2d 226, 228-29 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.).

133. MacDonald v. Texaco, Inc., 713 S.W.2d 203, 205 (Tex. App.—Corpus Christi 1986, no writ)(citing *Shing v. Aetna Casualty & Surety Co.*, 170 S.W.2d 786, 788 (Tex. Civ. App.—Dallas 1943, no writ)).

134. *Id.* (citing *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1985)).

or damages.[135] Texaco's advertising jingle ("You can trust your car to the man who wears the star") was not a producing cause of damage based on repairs made by a Texaco employee when the car owner went to the station because it had an available mechanic and was convenient and not because of faith in the oil company or its advertising.[136] Although reliance is not a defense to a DTPA action, if there is no reliance there can be no producing cause.[137] In *Flenniken v. Longview Bank & Trust Co.*,[138] the Texas Supreme Court held that a plaintiff's status as a consumer depends upon its relationship to the transaction, rather than a contractual relationship to the defendant.[139] Therefore, even though a consumer may only be seeking money from a lender, if the money is being used to purchase goods or services, the person is considered to be seeking goods or services and is a consumer under the DTPA.[140]

B. *Purchased or Leased for Use*

Both the definition of "goods" and of "services" under the DTPA require that the goods and services be "purchased or leased for use."[141] Therefore, a gratuitous act is not a service under the Act because it is not purchased.[142] Also, winners of prizes are not consumers where no purchase of goods is involved.[143]

Many courts initially held that the "for use" requirement limited the DTPA to ultimate users, not purchasers for resale,[144] while other

135. *Id.*

136. *Id.* at 205-06.

137. Khan v. Velsicol Chem. Corp., 711 S.W.2d 310, 318-19 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

138. 661 S.W.2d 705 (Tex. 1983).

139. *Id.* at 707 (plaintiff was consumer because loan sought for purchase of house, a good under DTPA).

140. *Id.* The rule in *Riverside* still applies if the borrower was seeking only an extension of credit. *See* La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 567 (Tex. 1984). The services of a loan broker arranging a loan, however, are a service within the meaning of the DTPA. *See* Mercantile Mortgage Co. v. University Homes, Inc., 663 S.W.2d 45, 47-48 (Tex. App.—Houston [14th Dist.] 1983, no writ).

141. TEX. BUS. & COM. CODE ANN. § 17.45(1),(2) (Vernon 1987).

142. Longview Sav. & Loan Ass'n v. Nabours, 673 S.W.2d 357, 362 (Tex. App.—Texarkana 1984), *aff'd*, 700 S.W.2d 901 (Tex. 1985).

143. Rutherford v. Whataburger, Inc., 601 S.W.2d 441, 444 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); Hall v. Bean, 582 S.W.2d 263, 265 (Tex. Civ. App.—Beaumont 1979, no writ).

144. *See* South Texas Irrigation Sys., Inc. v. Lockwood Corp., 489 F. Supp. 256, 258-59

courts held that a resale was a "use" and qualified the purchaser as a consumer.[145] The Texas Supreme Court settled the dispute in *Big H Auto Auction, Inc. v. Saenz Motors*,[146] holding that a used car dealer purchasing cars for resale was a consumer, ending any speculation that a DTPA "consumer" need be a final user.[147]

C. *Business Consumer*

In 1983, the Texas Legislature amended the definition of consumer so as to expressly deny standing to assert a DTPA claim to business consumers with assets of $25 million or more.[148] Although this amendment became effective on August 29, 1983, it denies consumer standing to all designated business consumers, even with causes of action predating the amendment. "It has long been the rule in Texas that when the Legislature repeals [or amends] a statute creating a remedy, that repeal is effective immediately."[149] Furthermore, "if the legislature amends a remedy . . . the change will be effective retroactively."[150]

> This [Texas Supreme] court has frequently held that if a cause of action is based on a statute, the repeal or amendment of that statute without a savings clause for pending suits is given immediate effect. As stated in *Dickson v. Navarro County Levee Improvement District No. 3*:
>
> > It is almost universally recognized that if a statute giving a special remedy is repealed, without a saving clause in favor of pending suits, all suits must stop where the repeal finds them; and, if final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. A like general rule is that if a right to recover depends entirely upon a statute, its repeal deprives the court of jurisdiction over the subject matter.
>
> This rule was restated in *National Carloading Corp. v. Phoenix - El Paso Express, Inc.*:
>
> > [I]f final relief has not been granted before the repeal goes into ef-

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(W.D. Tex. 1980); Voss v. May, 646 S.W.2d 606, 608-09 (Tex. App.—Fort Worth 1983, writ dism'd).

145. Otto, Inc. v. Cotton Salvage & Sales, Inc., 609 S.W.2d 590, 593-95 (Tex. Civ. App.—Corpus Christi 1980, writ dism'd).

146. 665 S.W.2d 756 (Tex. 1984).

147. *Id.* at 759 (disapproving *Voss* and *South Texas Irrigation*).

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

149. La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 567 (Tex. 1984)(citing *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 384 (Tex. 1982)).

150. *Id.*

> fect it cannot be granted thereafter, even if a judgment has been entered and the cause is pending on appeal. The general rule is that when such law is repealed without a saving clause, it is considered, except as to transactions past and closed as though it had never existed.[151]

The Supreme Court ruled that "[t]he legislature could have included a savings provision in favor of pending . . . suits had it intended that such suits be preserved. Absent such a clause, [the Texas Supreme Court] cannot presume that the legislature intended to alter the general rule that a repeal [or amendment] terminates existing statutory causes of action."[152] The legislature did save pending causes of action in its 1979 and 1981 amendments to the DTPA.[153]

Even a pending cause of action does not survive when its statutory basis is repealed or amended unless the savings clause specifically and expressly saves pending causes of action.[154] There is no savings clause in the 1983 amendments to the DTPA which would save a business consumer's pending cause of action. The savings clause of the 1983 amendments is applicable only to contracts executed before the effective date of the amendment (i.e., waivers of DTPA claims in contracts executed before effective date are not valid.)[155]

The Texas legislature clearly distinguishes its express intent regarding the immediate application of the 1979 and 1981 amendments to a pending cause of action from the 1983 amendments. In 1983, the legislature expressly chose to "save" only existing contracts (i.e., no valid disclaimer of DTPA rights in contracts executed before effective date) from immediate or retroactive application, and did not intend to "save" the cause of action of a business consumer (with more than

151. Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 384 (Tex. 1982).

152. *Id.*

153. In contrast, the 1979 and 1981 amendments contained a savings clause which expressly "saved" all "causes of action" that arose either in whole or in part prior to the effective date of the amendment. The 1979 amendatory act provided in section 9: "This Act shall be applied prospectively only. Nothing in this Act affects either procedurally or substantively a cause of action that arose either in whole or in part prior to the effective date of this Act." The 1981 amendatory act provided in section 2: "Nothing in this Act shall affect procedurally or substantively a cause of action arising in whole or in part prior to the effective date of this Act." TEX. BUS. & COM. CODE ANN. § 17.42 historical note (Vernon 1987).

154. *Knight*, 627 S.W.2d at 384.

155. The 1983 amendatory act provided in section 4: This Act applies only to a contract executed on or after the effective date of this Act. A contract executed before the effective date of this Act is governed by the law in effect when the contract was executed. TEX. BUS. & COM. CODE ANN. §§ 17.42, 17.45 historical note (Vernon 1987).

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$25 million in assets) arising in whole or in part prior to the effective date of such amendment.[156]

Although not the subject of much litigation, the business consumer exclusion provides an implied defense for persons sued by large companies under the DTPA.[157] In *Eckman v. Centennial Savings Bank*,[158] the Dallas Court of Appeals held that the burden is upon the plaintiff business consumer to establish that it qualifies under the $25 million asset limitation; the defendant does not have the burden of pleading and proving the exception as an affirmative defense.[159] The Texas Supreme Court, however, reversed the Dallas Court of Appeals, holding that the defendant must raise the plaintiff's lack of consumer status specifically by special exception.[160] Once the exception is placed in issue, the plaintiff has the burden to present evidence and prove its consumer status.[161]

D. *Defenses Related to Plaintiff's Obligation to Provide Notice*

Before plaintiffs can file suit seeking damages under section 17.50(b)(1) of the DTPA, they must give written notice to the defendant at least thirty days before filing suit.[162] "The purpose of the notice requirement is to facilitate settlement of claims by giving the alleged wrongdoer a chance to compromise the claim, rather than expose himself to additional damages and attorney's fees . . . ."[163] Although the DTPA provides that the notice must advise the person of the consumer's specific complaints and the amount of actual damages and attorney's fees claimed by the consumer,[164] the notice need not invoke the DTPA, or threaten suit,[165] but must only indicate a claim against

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156. *Id.*; *see also* Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 384 (Tex. 1982)(discussing prior legislation).

157. Eckman v. Centennial Sav. Bank, 32 Tex. Sup. Ct. J. 46, 47 (Oct. 26, 1988)(businesses with assets over $25 million not consumers).

158. 742 S.W.2d 826 (Tex. App.—Dallas 1987), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 46 (Oct. 26, 1988).

159. *Id.* at 828.

160. *See* Eckman v. Centennial Sav. Bank, 32 Tex. Sup. Ct. J. 46, 47-48 (Oct. 28, 1988).

161. *Id.*

162. TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon 1987); *see also* Cail v. Service Motors, Inc., 660 S.W.2d 814, 815 (Tex. 1983).

163. Miller v. Presswood, 743 S.W.2d 275, 281 (Tex. App.—Beaumont 1987, no writ).

164. *Id.*

165. Barnard v. Mecom, 650 S.W.2d 123, 127 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.). The letter need not specify which subsection of section 17.46 is claimed to have been violated, *Village Mobile Homes, Inc. v. Porter*, 716 S.W.2d 543, 547 (Tex. App.—Austin

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the recipient.[166]

The procedural and substantive notice requirements have changed throughout the history of the DTPA. Originally, the DTPA did not require notice prior to suit. By amendment in 1977, section 17.50A(2) of the DTPA was added to provide an affirmative defense to defendants who could plead and prove that they were not notified of plaintiff's claims thirty days before suit.[167] The present wording, now section 17.505, eliminated lack of notice as an affirmative defense.[168] Instead, the burden seemed to shift to plaintiff to plead and prove that notice was given to the defendant at least thirty days prior to filing suit.[169] Several courts, however, have held that the defendant must raise a lack of notice defense by specially excepting and filing a

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1986, no writ), and can simply quote the conclusory language of the statute, *North American Van Lines of Texas, Inc. v. Bauerle*, 678 S.W.2d 229, 235 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.). The courts are attempting to be very liberal with regard to the notice requirement and have held that damages stated in terms of "not less than" with no mention of attorney's fees or expenses was sufficient. Williams v. Hills Fitness Center, Inc., 705 S.W.2d 189, 193 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.). A letter simply requesting performance but not specifying damages was held to be sufficient, *McCann v. Brown*, 725 S.W.2d 822, 825 (Tex. App.—Fort Worth 1987, no writ), and the forwarding of a "punch list" has been held to be a sufficient demand for performance by a contractor, *Arch Construction, Inc. v. Tyburec*, 730 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). For contrary construction, see, e.g., Certainteed Corp. v. Cielo Dorado Development, Inc., 733 S.W.2d 247, 249 (Tex. App.—El Paso 1987, writ granted); Hollingsworth Roofing Co. v. Morrison, 668 S.W.2d 872, 875 (Tex. App.—Fort Worth 1984, no writ); Sunshine Datsun, Inc. v. Ramsey, 680 S.W.2d 652, 654 (Tex. App.—Amarillo 1984, no writ). Notice not supplemented to include damages claimed later was inadequate, but abatement was proper, not dismissal. International Nickel Co. v. Trammel Crow Distrib. Corp., 803 F.2d 150, 156 (5th Cir. 1986). The only relief provided by any appellate court has been the abatement of the case for 30 days from the time when proper notice is received. *Id.*

166. *See* McCann v. Brown, 725 S.W.2d 822, 825 (Tex. App.—Fort Worth 1987, no writ)(buyer's letter demanding seller return trailer sufficient notice under DTPA).

167. *See* Deceptive Trade Practices - Consumer Protection Act—Definitions, Relief, Defenses, Legislative Intent, ch. 216, § 17.50A(2), 1977 Tex. Gen. Laws 600, 604, *amended by* Deceptive Trade Practices - Consumer Protection Act, ch. 603, § 17.50A, 1979 Tex. Gen. Laws 1327, 1330-31, *amended by* Act of Sept. 1, 1987, ch. 167, § 5.02(4), (5), 1987 Tex. Gen. Laws 1338, 1361 (currently codified at TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987)).

168. *See* Deceptive Trade Practices — Consumer Protection Act, ch. 603, § 17.50A, 1979 Tex. Gen. Laws 1327, 1330-31, *amended by* Act of Sept. 1, 1987, ch. 167, § 5.02(4), (5), 1987 Tex. Gen. Laws 1338, 1361 (renumbered)(currently codified at TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987)).

169. *See* Deceptive Trade Practices — Consumer Protection Act, ch. 603, § 17.50A, 1979 Tex. Gen. Laws 1327, 1330-31, *amended by* Act of Sept. 1, 1987, ch. 167, § 5.02(4), (5), 1987 Tex. Gen. Laws 1338, 1361 (renumbered)(currently codified at TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987)).

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plea in abatement or this defense can be waived.[170]

Further, despite the clear language of the statute indicating notice as a prerequisite to filing suit, the general remedy invoked by courts for lack of notice is to abate the suit for thirty days, allowing the plaintiff to comply and send notice.[171] Thus, summary judgment is not appropriate for lack of notice.[172]

Section 17.505 contains two noteworthy exceptions to the notice requirement. First, no notice is required if it is rendered impractical by the statute of limitations.[173] Second, notice is not necessary if the DTPA cause of action is asserted by way of counterclaim.[174]

E. *Defenses to Awards of Damages*

1. Offer of Settlement

Section 17.505(c) and (d) of the DTPA provide a partial defense to an award of damages to a consumer. These sections provide that a defendant, after receiving notice of a consumer's claim, can tender a written settlement offer within thirty days, including an agreement to reimburse the consumer for attorney's fees.[175] If the defendant does not receive written notice prior to suit, the settlement offer may be tendered within thirty days after the filing of the suit or counterclaim.[176] If the offer is not accepted by the consumer within thirty days of receipt, it is deemed to have been rejected.[177] Upon rejection, the defendant can file the offer with the court along with an affidavit certifying its rejection.[178] After trial, if the court finds that the settle-

170. *See, e.g.*, Miller v. Presswood, 743 S.W.2d 275, 281 (Tex. App.—Beaumont 1987, no writ); Challenge Transp., Inc. v. J-Gem Transp., Inc., 717 S.W.2d 115, 117 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). Further, if a plaintiff pleads notice such pleading without corresponding proof is sufficient unless specifically denied by defendant. Investors, Inc. v. Hadley, 738 S.W.2d 737, 741-42 (Tex. App.—Austin 1987, writ denied).

171. *See* Star-Tel, Inc. v. Nacogdoches Telecommunications, Inc., 755 S.W.2d 146, 149 (Tex. App.—Houston [1st Dist.] 1988, no writ); Netterville v. Interfirst Bank, 718 S.W.2d 921, 923 (Tex. App.—Beaumont 1986, no writ).

172. *Netterville*, 718 S.W.2d at 923.

173. TEX. BUS. & COM. CODE ANN. § 17.505(b) (Vernon 1987); *see also* Russell v. Campbell, 725 S.W.2d 739, 746 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

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

175. *Id.* § 17.505(c). The tender of settlement must be in the form provided by law and must offer to reimburse the consumer for attorney's fees. Cail v. Service Motors, Inc., 660 S.W.2d 814, 815 (Tex. 1983).

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

177. *Id.*

178. *Id.* § 17.505(d). It is clear that a defendant must offer to reimburse the consumer for

ment offer amount was the same or substantially the same as the actual damages found by the trier of fact, the consumer may not recover damages in excess of the settlement amount or the amount of actual damages found by the trier of fact, whichever is less.[179] Also, a proper settlement offer acts as a cap to the award of attorney's fees under the Act.[180]

2. Reliance on Written Information from Others

Section 17.506 of the Act provides the only complete defenses to DTPA claims, but the defenses provided are probably of little use or comfort to most defendants. Subsection (a) provides a defense to the award of damages or attorney's fees if the defendant proves that before consummation of its transaction with plaintiff, it gave reasonable notice to the plaintiff of its reliance on: "(1) written information relating to the particular goods or service in question obtained from official government records . . .; (2) written information relating to the particular goods or service in question obtained from another source . . .; or (3) written information concerning a test required or prescribed by a government agency . . . ."[181] Reliance upon information from other sources requires proof that the information "was false or inaccurate" and that the "defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information."[182] Further, a defendant must show that the false or inaccurate information "was a producing cause of the alleged damage."[183] This defense has little practical application in most cases, but it is available if the right facts are presented. The defense requires pre-litigation planning because the notice of reliance must be sent to the purchaser

reasonable attorney's fees in his settlement offer or it fails as a matter of law. *Cail*, 660 S.W.2d at 815 (holding that section 17.50A(c) [now 17.505(c)] specifically mandates including attorney's fees in settlement offer).

179. TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon 1987). Defendant's settlement offer is relevant only to the determination of whether such settlement offer substantially approximates the damages awarded by the trier of fact. *Id.* § 17.505(e). It is not admissible as evidence of defendant's unlawful conduct. The Act provides no guidance concerning when a settlement offer amount is substantially the same as the amount of damages. *Id.*; *see also* Village Mobile Homes, Inc. v. Porter, 716 S.W.2d 543, 547-48 (Tex. App.—Austin 1986, writ ref'd n.r.e.)($2,500 settlement offer not same or substantially same as $8,143.57 actual damages).

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

181. *Id.* § 17.506(a)(1),(2),(3).

182. *Id.* § 17.506(a)(3).

183. *Id.* § 17.506(b).

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before consummation of the transaction forming the basis of the suit.[184]

3. Tender of Amount Claimed

A second defense of limited usefulness is under section 17.506(d) of the Act. This section provides an affirmative defense if, within thirty days after receiving notice of the plaintiff's claim, the defendant tenders to plaintiff the amount of actual damages claimed and the expenses incurred by the consumer, including attorney's fees.[185] It is difficult to imagine the actual use of this defense at trial.

4. Set-Off

Consumers who prevail in DTPA actions are entitled to recover actual damages, two times the portion of actual damages not exceeding $1,000, and, if the defendant's conduct was committed knowingly, three times the amount of actual damages in excess of $1,000.[186] One recognized defense to the additional damages available under the DTPA arises through the use of set-off. Texas courts have held that any allowable set-off a defendant has to a plaintiff's claims are to be deducted prior to trebling[187] and, unless the plaintiff has a net recovery against the defendant after all allowable set-offs are applied, treble damages are not awarded.[188] Further, under the language of the DTPA, if a plaintiff's net recovery is less than $1,000, no treble damages are available because treble damages are only assessed on the

184. *Id.* § 17.506(a).

185. TEX. BUS. & COM. CODE ANN. § 17.506(d) (Vernon 1987).

186. *Id.* § 17.50(b)(1). The 1979 amendments to the Act eliminated mandatory treble damages. *See* Deceptive Trade Practices—Consumer Protection Act, ch. 603, § 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330. Punitive and DTPA damages may be awarded when the plaintiff proves a distinct tortious action with actual damages separate and apart from the damages accruing from the DTPA violation. Prejudgment interest is not part of actual damages resulting from the breach of the DTPA and therefore may not be trebled. *Id.*

187. Smith v. Baldwin, 611 S.W.2d 611, 617 (Tex. 1980). The dissent in *Guerro v. Brumlow*, 630 S.W.2d 425, 433 (Tex. App.—San Antonio 1982, no writ) argued that the deterrent efforts of the DTPA require that *Smith v. Baldwin* be restricted to counterclaims and set-offs arising from the same transaction as that on which plaintiff's DTPA claim was based. *Id.*

188. Building Concepts, Inc. v. Duncan, 667 S.W.2d 897, 902 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)(no net damages); Birds Constr., Inc. v. McKay, 657 S.W.2d 514, 516 (Tex. App.—Corpus Christi 1983, no writ)(no net damages in construction case); St. John v. Barker, 638 S.W.2d 239, 245 (Tex. App.—Amarillo 1982) (no net damages in home remodeling case), *modified*, 645 S.W.2d 261 (Tex. 1983).

portion of a plaintiff's actual damages in excess of $1,000.[189] A defendant can also set-off a net recovery against an award of attorney's fees in favor of the consumer.[190] Credits to defendant for settlement proceeds received by a plaintiff from settling defendants, however, are deducted after the trebling of the plaintiff's actual damages, under the reasoning that deduction prior to trebling would not give plaintiffs their entire awards.[191] Considering the possibly immense value of set-offs, defendants are wise to assert any possible counterclaims against the plaintiff whenever DTPA litigation is filed.

5. Mitigation of Damages

Texas courts hold that DTPA plaintiffs are under an obligation to mitigate their damages.[192] Further, since plaintiffs are under a duty to mitigate damages, they are entitled to recover as damages all amounts reasonably expended in an effort to mitigate.[193] In order to obtain a jury instruction on plaintiff's failure to mitigate, the defendant must prove not only lack of diligence by the plaintiff, but also the amount by which plaintiff's damages were increased by the failure to mitigate.[194]

6. Reasonable and Necessary

Texas courts have held that recovery of expenses as damages under the DTPA requires a showing that the expenses were reasonable and necessary.[195] A recent supreme court opinion, however, casts doubt on this requirement. In *Jacobs v. Danny Darby Real Estate, Inc.*,[196] the court upheld an award of expenses as damages holding that the plaintiff had introduced "some evidence" supporting the reasonableness and necessity of his expenses, and thereby implying that such a

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189. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987).

190. Satellite Earth Stations East, Inc. v. Davis, 756 S.W.2d 385, 387 (Tex. App.—Eastland 1988, no writ).

191. Providence Hosp. v. Truly, 611 S.W.2d 127, 136 (Tex. Civ. App.—Waco 1980, writ dism'd).

192. Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 924 (Tex. App.—Waco 1985, error dism'd).

193. Orkin Exterminating Co., Inc. v. Lesassier, 688 S.W.2d 651, 653 (Tex. App.—Beaumont 1985, no writ).

194. Cocke v. White, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, no writ).

195. Oakes v. Guerra, 603 S.W.2d 371, 373 (Tex. App.—Amarillo 1980, no writ).

196. 750 S.W.2d 174 (Tex. 1988).

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showing was necessary.[197] However, the concurring opinion, authored by Justice Kilgarlin with Justice Ray joining, indicated opposition to a requirement of reasonableness and necessity for expenses awarded as damages.[198] This concurrence seems inconsistent with prior Texas law, however, which has held that the measure of "actual damages" under section 17.50(a)(1) of the DTPA is those damages available as actual damages under the common law.[199]

7. Restitution

Section 17.50(b)(3) authorizes a prevailing consumer to obtain sufficient relief to "restore . . . any money or property, real or personal, which may have been acquired in violation of [the DTPA]."[200] The unresolved issue is whether this is a new statutory remedy or simply a codification of the common-law right of restitution.[201]

8. Contribution and Indemnity

The DTPA has two indemnity provisions. Section 17.55 allows indemnity for the seller of goods or services who is assessed damages or penalties for misrepresentations contained in advertisements or promotional materials prepared by others.[202] The seller can recover the damages assessed and attorney's fees by showing: "(1) the seller re-

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197. *Id.* at 176.

198. *Id.*

199. Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).

200. TEX. BUS. & COM. CODE ANN. § 17.50(b)(3) (Vernon 1987).

201. In *United Postage Corp. v. Kammeyer*, 581 S.W.2d 716, 723 (Tex. Civ. App.—Dallas 1975, no writ), the court held that although the consumer had failed to prove an element essential to recovery of actual damages under section 17.50(b)(1), he nevertheless was entitled to return of the consideration paid. The court reasoned that the legislature had provided an option to a consumer of the return of all consideration paid rather than the receipt of actual damages. *Id.* Another court has held that a consumer must plead and prove the common-law grounds for rescission and comply with the provisions of the Texas Business and Commerce Code which govern revocation of acceptance and cancellation of contracts. Freeman Oldsmobile Mazda Co. v. Pinson, 580 S.W.2d 112, 114 (Tex. Civ. App.—Eastland 1979, no writ). Further, a consumer should not be able to recover both actual damages and restitution of the purchase price. Smith v. Kinslow, 598 S.W.2d 910, 915 (Tex. Civ. App.—Dallas 1980, no writ). However, if there is a complete failure of consideration, the prevailing consumer may recover both actual damages and partial rescission. Whirlpool Corp. v. Texical, Inc., 649 S.W.2d 55, 57 (Tex. App.—Corpus Christi 1982, no writ). In *Whirlpool*, the court said that the reason for the recovery of rescission and treble damages was because the recovery was based on two different theories and two different events. *Id.*

202. TEX. BUS. & COM. CODE ANN. § 17.55 (Vernon 1987).

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ceived the advertisements or promotional material from the third party; (2) the seller's only action with regard to the advertisements or promotional material was to disseminate the material; and (3) the seller has ceased disseminating the material."[203]

The second provision provides contribution or indemnity for a defendant from anyone who, under statutory or common law, may be liable for the consumer's damages.[204] The only remnants of common-law indemnity are remedies for those suffering from purely vicarious liability, such as an innocent retailer[205] or an agent acting on behalf of a principal.[206] Attorney's fees are recoverable by one defendant from a second defendant who seeks indemnity from the first.[207]

One unresolved question is which system for contribution applies to DTPA actions. The contribution scheme provided in Chapter 32 of the Texas Civil Practice and Remedies Code would probably not apply because it is specifically limited to tort actions[208] and does not apply "if a right of contribution, indemnity, or recovery between defendants is provided by other statute or by common law."[209] Chapter 33 applies only to negligence actions[210] and is specifically exempted from application to DTPA actions.[211] The remaining possibility is the pure comparative system created by the Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*[212] This system was established for products liability or breach of warranty actions and could logically be extended to breach of warranty and other actions brought under the DTPA, since in most litigation, plaintiffs will be suing in the same action for common-law torts, breach of contract, and breach of warranty, as well as asserting claims under the DTPA.

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203. *Id.*

204. *Id.* § 17.555.

205. Aviation Office v. Alexander & Alexander, 751 S.W.2d 179, 180 (Tex. 1988).

206. Mercedes-Benz of N. Am., Inc. v. Dickenson, 720 S.W.2d 844, 858 (Tex. App.—Fort Worth 1986, no writ)(authorized automobile dealer held entitled to indemnity under DTPA from manufacturer where dealer acting for manufacturer's benefit).

207. Swafford v. View-Caps Water Supply Corp., 617 S.W.2d 674, 675 (Tex. 1981). It is not necessary that the defendant be found liable to the plaintiff in order to recover attorney's fees. *Id.*

208. TEX. CIV. PRAC. & REM. CODE ANN. § 32.001(a) (Vernon 1987).

209. *Id.* § 32.001(b). Since the DTPA has a section providing for contribution and indemnity, chapter 32 should not apply to DTPA cases.

210. *Id.* § 33.001(a).

211. *Id.* § 33.002(a).

212. 665 S.W.2d 414 (Tex. 1984).

9. Attorney's Fees

A consumer who prevails in the trial court may recover reasonable and necessary attorney's fees.[213] To be considered the prevailing party, a consumer must only obtain some relief authorized by section 17.50(b).[214] A consumer need not segregate attorney's fees between different causes of action which arise from the same facts even though fees are not recoverable under one or more such claims.[215] However, where a consumer prevails against only one of several defendants, the fees attributable to the successful claim must be segregated.[216] Failure to segregate attorney's fees incurred by defendant in defending the main suit from those incurred in prosecuting a third party DTPA claim bars recovery of any fees.[217] A net recovery is not required to obtain attorney's fees.[218] Prejudgment interest is not recoverable in the attorney's fee award.[219] Disciplinary Rule 2-106 provides the factors to be considered in determining the reasonableness of the fee:

> The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal services properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customer would be charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation and ability of the lawyer or lawyers performing this service; and whether the fee is fixed or contingent.[220]

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213. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1986). The award of attorney's fees in some amount is mandatory to a prevailing consumer. Doerfiar v. Espensen, 659 S.W.2d 929, 931 (Tex. App.—Corpus Christi 1983, no writ).

214. Cordrey v. Armstrong, 553 S.W.2d 798, 799 (Tex. Civ. App.—Beaumont 1977, no writ). Obtaining an injunction award will not support an award of attorney's fees pursuant to the DTPA. *See* Easy Living, Inc. v. Cash, 617 S.W.2d 781, 784 (Tex. Civ. App.—Fort Worth 1981, no writ).

215. Village Mobile Homes, Inc. v. Porter, 716 S.W.2d 543, 552 (Tex. App.—Austin 1986, no writ).

216. Fortune v. McElhenney, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ).

217. Wood v. Component Constr. Corp., 722 S.W.2d 439, 444-45 (Tex. App.—Fort Worth 1986, no writ).

218. McKinley v. Drozd, 685 S.W.2d 7, 10 (Tex. 1985); *accord* Mathews v. Candlewood Builders, Inc., 685 S.W.2d 649, 650 (Tex. 1985)(per curiam).

219. Hervey v. Passero, 658 S.W.2d 148, 149 (Tex. 1983); McCann v. Brown, 725 S.W.2d 822, 826 (Tex. App.—Fort Worth 1987, no writ).

220. The Fifth Circuit will probably apply the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), to determine reasonable and

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It appears that testimony with regard to time spent on a matter and a reasonable hourly rate may not be necessary to support an award of attorney's fees.[221]

F. *Counterclaim for Groundless Suit*

Defendants may bring counterclaims for groundless suits brought in bad faith or for the purpose of harassment and, if successful, collect reasonable and necessary attorney's fees and court costs.[222]

The defendant has the burden of proving the suit is groundless or brought in bad faith.[223] In determining these issues, the courts consider a "groundless" suit as one where there is no arguable basis for a DTPA claim.[224] A finding of "bad faith" seems to require a showing that plaintiffs knew their claims to be false or that they brought their claims with malicious intent.[225] Nonsuit or voluntary dismissal of DTPA claims by the plaintiff will not preclude imposition of attorney's fees if the defendant obtains favorable findings on its counterclaim since there is no requirement that the suit be prosecuted to its

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necessary attorney's fees. *See also* Chapman & Cole v. Itel Container Int'l, B.V., 665 F. Supp. 1283 (S.D. Tex. 1987). The Texas Supreme Court has specifically refused to approve the practice of submitting bad faith or harassment issues to a jury, but has reserved judgment on whether such findings should be made by the trial court. Leissner v. Schott, 668 S.W.2d 686, 686 (Tex. 1984). The courts of appeals continue to be divided on the issue. *See, e.g.*, Carrington v. Hart, 703 S.W.2d 814, 818-19 (Tex. App.—Austin 1986, no writ)(question of law for court); Parks v. McDougal, 659 S.W.2d 875, 877 (Tex. App.—San Antonio 1983, no writ)(question of fact for jury); Fichtner v. Richardson, 708 S.W.2d 479, 482 (Tex. App.—Dallas 1986, writ ref'd n.r.e.)(bad faith or harassment question for jury while groundlessness question of law).

221. George Pharis Chevrolet v. Polk, 661 S.W.2d 314, 318 (Tex. App.— Houston [1st Dist.] 1983, no writ). The supreme court in *Fairmont Homes, Inc. v. Upchurch*, 711 S.W.2d 618, 619 (Tex. 1986), held a 40% contingency fee contract not to be supported by sufficient evidence because there was no proof that the hours expended or the complexity of the case or the other factors set forth in Disciplinary Rule 2-106. *But see* March v. Thiery, 729 S.W.2d 889, 897 (Tex. App.—Corpus Christi 1987, no writ)(attorney's fees of one-third of recovery allowed where attorney testified such fee arrangement reasonable for case and for services rendered).

222. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987). It remains unresolved whether the finding relating to this counterclaim due to be made by the court or the jury.

223. Fichtner v. Richardson, 708 S.W.2d 479, 482 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

224. Hill v. Pierce, 729 S.W.2d 340, 341 (Tex. App.—El Paso 1987, writ ref'd n.r.e.); Xarin Real Estate, Inc. v. Gamboa, 715 S.W.2d 80, 86 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

225. Group Hosp., Inc. v. One & Two Brookriver Center, 704 S.W.2d 886, 891-92 (Tex. App.—Dallas 1986, no writ).

conclusion.[226]

G. *Privity and "Inextricably Intertwined"*

Privity between the consumer and the defendant is not a requirement for standing in DTPA actions.[227] Instead, standing is established by showing that "the goods or services sought or acquired by the consumer form the basis of his complaint.[228]

In *Flenniken v. Longview Bank & Trust Co.*, the plaintiffs sought to hold a mortgage lender liable under the DTPA when the contractor on their home abandoned the project before completion.[229] The plaintiffs had failed to pay the bank for their unfinished home and the bank foreclosed on the property.[230] The bank's defense to the DTPA action was that the bank was not in privity with the plaintiffs since the plaintiffs had not sought or acquired goods or services directly from them.[231] The supreme court, however, held otherwise:

> If, in the context of a transaction in goods or services, any person engages in an unconscionable course of action which adversely affects a consumer, that person is subject to liability under the DTPA . . . . The Flennikens, therefore, were consumers as to all parties who sought to enjoy the benefits of that transaction, including the Bank.[232]

Because the bank's unconscionable act in selling the house arose out of the consumer transaction between the plaintiff and the contractor, the court held that the bank could be liable under the DTPA.[233] Therefore, no direct purchase or lease of goods or services from the defendant is necessary so long as the defendant has some connection with the consumer transaction whereby the consumer is injured.[234]

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226. Pope v. Darcey, 667 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

227. Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540-41 (Tex. 1981).

228. Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983).

229. *Id.* at 706. The house was only 20 percent complete at the time of abandonment. *Id.*

230. *Id.* The foreclosure occurred after the Bank and the plaintiffs failed to reach an agreement on how to proceed with the unfinished house. *Id.*

231. *Id.* at 706-707. The bank asserted that since the plaintiffs did not acquire goods or services from it, the plaintiffs did not have standing as consumer against the bank. *Id.*

232. *Id.* at 707.

233. Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983). The court stated that the bank had no greater foreclosure rights than the contractor. *Id.* Therefore, since foreclosure by the contractor would be unconscionable, foreclosure by the bank was unconscionable thereby subjecting the bank to DTPA liability. *Id.*

234. *Id. But see* Home Sav. Ass'n v. Guerra, 733 S.W.2d 134, 136 (Tex. 1987)(no deriva-

Texas courts have also employed an "inextricably intertwined" standard to test the potential liability of defendants. The standard was initially used to determine a plaintiff's standing as a consumer but has become instead a method used by some courts to sustain claims of liability against defendants not in privity with the plaintiff.

The "inextricably intertwined" standard arose from the progeny of *Riverside National Bank v. Lewis*.[235] In *Riverside*, the Texas Supreme Court held that a plaintiff, who was merely seeking to acquire money, could not sue a lender under the DTPA because he would not be a consumer for the purposes of the DTPA.[236] Subsequently, the supreme court considered a case wherein the plaintiff financed its purchase of a dump truck from a dealer by executing an installment loan contract.[237] The appellate court held that the plaintiff was not a consumer because his cause of action arose from the borrowing of money and not from the purchase of a good or service.[238] The Texas Supreme Court reversed, holding that the finance company was so heavily involved in the sale of the dump truck that the plaintiff should be considered a consumer under the DTPA.[239] The court stated that: "Given these facts, we hold that [the dealer] and [the finance company] were so inextricably intertwined in the transaction as to be equally responsible for the conduct of the sale."[240] Because of the finance company's close relationship with the seller of the dump truck, the court held that the plaintiff was a consumer to all the parties who had received benefits from the sale.[241] It is significant to note that in *Knight v. International Harvester Credit Corp.*, the Texas Supreme Court used the "inextricably intertwined" standard to determine consumer standing under the Act. It was not used as a standard to find liability for parties not in privity with the plaintiff.

Subsequent to *Knight*, several courts of appeals have used the inextricably intertwined standard in order to impose vicarious liability.

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tive liability attached to a defendant based on innocent involvement in business transaction); Wynn v. Kensington Mortgage & Fin. Corp., 697 S.W.2d 47, 49-50 (Tex. App.—Austin 1985, no writ)(consumer financer not liable for defects in financed product).

235. 603 S.W.2d 169 (Tex. 1980).

236. *Id.* at 173.

237. Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 389 (Tex. 1982).

238. *Id.* at 388.

239. *Id.* at 389.

240. *Id.*

241. *Id.*

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For example, in *Potere, Inc. v. National Realty Service,*[242] the plaintiff purchased a real estate franchise from Matchmaker Home Marketing Systems, Inc.[243] One of the services to be provided under the franchise was a guaranteed purchase of those properties which did not sell during the plaintiff's listing period.[244] Matchmaker worked in conjunction with Potere, Inc. in providing this service.[245] When the plaintiff presented a property to be purchased under this service, Potere refused to purchase the property.[246] Potere operated jointly with Matchmaker to provide the service.[247]

The appellate court was presented with the issue of Poetere's liability to the plaintiff.[248] Potere asserted that it was not liable to the plaintiff because the cause of action arose from the guarantee made by Matchmaker. The court held that because Potere and Matchmaker worked closely together in the transaction, they were so "inextricably intertwined" that Potere could be held liable for the acts of Matchmaker.[249] Thus, the court used the inextricably intertwined standard to support a finding of vicarious liability, rather than to determine plaintiff's standing as a consumer.

The Eastland Court of Appeals, however, rejected the use of an inextricably intertwined standard to find the defendants liable in *Colonial Leasing Co. v. Kinerd.*[250] This case involved the leasing of equipment wherein Colonial Leasing served as the leasing company for equipment supplied by another company.[251] Plaintiffs sued both the supplier and the leasing company, arguing that the two companies were so inextricably intertwined that the leasing company could be held liable for the misrepresentations of the equipment supplier.[252] The Eastland court, in holding otherwise, stated:

> [W]e hold the concept of being "inextricably intertwined" relates to the

242. 667 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1984, no writ).

243. *Id.* at 254-55.

244. *Id.*

245. *Id.* Matchmaker forwards the papers to Potere, Inc. who actually signs the purchase contract. *Id.*

246. *Id.*

247. Potere, Inc. v. National Realty Serv., 667 S.W.2d 252, 255-56 (Tex. App.—Houston [14th Dist.] 1984, no writ).

248. *Id.*

249. *Id.*

250. 733 S.W.2d 671 (Tex. App.—Eastland 1987, writ ref'd n.r.e.).

251. *Id.* at 672.

252. *Id.*

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> standing of a plaintiff to file suit under the Deceptive Trade Practices Act [DTPA], not to a defendant's liability under the Act. The plaintiff must still show that the defendant did something wrongful [either in person or by an authorized or apparent agent] or ratified the transaction with knowledge of the wrongful acts in order to be held liable.[253]

The Eastland court thus retreated to the original use of the inextricably intertwined standard as limited to issues of standing and not vicarious liability.

H. *Limitations*

DTPA actions are governed by a two-year statute of limitations.[254] The statute provides that all DTPA actions must be brought within two years after the "false, misleading, or deceptive act or practice occurred[255] or within two years after the plaintiff discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading or deceptive act or practice."[256] The limitations section also contains a provision which extends the limitations period an additional 180 days if the plaintiff shows that its failure to timely bring the action is caused by a situation where "the defendant is knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action."[257]

One unresolved issue is the limitations period to be applied to breach of warranty actions brought under the DTPA. Historically,

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253. *Id.* at 673.

254. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987).

255. *Id.*

256. *Id.* A clever, but incorrect plaintiff can argue that section 17.565 does not apply to all DTPA actions. The section by its very terms fails to include possible DTPA actions of breach of warranty, unconscionable actions or violations of article 21.21 of the Texas Insurance Code. The legislature intended that it cover all DTPA actions and not just those which are listed in the section 17.46 laundry list, but by its terms, it does not expressly apply to all DTPA actions.

257. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987). Section 17.565 expressly incorporates the discovery rule. The courts have been split with regard to whether constructive notice provides sufficient information to trigger the discovery rule. *See* Hartsough v. Steinberg, 737 S.W.2d 408, 411 (Tex. App.—Dallas 1987, writ denied)(discovery rule applied and barred plaintiff's claims but failed to provide who bears onus on discovery issue); Leonard v. Eskew, 731 S.W.2d 124, 135 (Tex. App.—Austin 1987, writ ref'd n.r.e.)(recorded deeds held constructive notice of claim for misrepresentation); Russell v. Campbell, 725 S.W.2d 739, 748 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.)(failure to make discovery of fraud excused by breach of fiduciary duty by defendant, even though recorded instruments gave constructive notice).

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non-DTPA breach of warranty actions were entitled to the four-year limitations period of section 16.004 of the Texas Civil Practice and Remedies Code.[258] The DTPA, however, has only a two-year limitations period.[259] If plaintiff's action is based on breach of warranty but is brought under the DTPA, a conflict exists between the two limitations periods. One possible solution, given a breach of warranty, would be to allow the plaintiff its usual common-law breach of warranty suit for four years, but only allow the plaintiff to sue for DTPA remedies for two years after the breach.[260]

IV. CONCLUSION

As will be evident by now, pre-transactional planning is essential in many cases to reduce potential liability under the Texas Deceptive Trade Practices Act. Furthermore, this quest is not entirely quixotic, particularly to the extent that arbitration may be compelled. In addition, careful analysis of such issues as consumer standing, available set-offs, and possible third-party claims for contribution may reduce to a great degree the sting of litigating adverse claims under the Act. In the final analysis, however, the most secure methods of defense will involve either negating a violation of the Act, establishing that it was not a cause of actual damages, or negating the accrual of any damages at all.

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258. Conann Constructors, Inc. v. Muller, 618 S.W.2d 564, 566-67 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

259. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987); *see also* River Oaks Townhomes Owners' Ass'n v. Bunt, 712 S.W.2d 529, 531 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

260. See Walker v. Sears, Roebuck & Co., 853 F.2d 355, 363-64 (5th Cir. 1988), in which the Fifth Circuit held that plaintiff stated a claim for both breach of warranty and under the DTPA and plaintiff's breach of warranty claim was governed by the four-year limitations period.