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1989 Texas DTPA Reform: Closing the DTPA Loophole in the 1987 Tort Reform Laws and the Ongoing Quest for Fairer DTPA Laws.

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ARTICLES

1989 TEXAS DTPA REFORM: CLOSING THE DTPA LOOPHOLE IN THE 1987 TORT REFORM LAWS AND THE ONGOING QUEST FOR FAIRER DTPA LAWS*

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SECTION I
1989 DTPA REFORM LEGISLATIVE HISTORY AND PROCESS

A. *Introduction*

Reform of the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA)[1] occurred during the 71st Session of the Texas Legislature because the DTPA was excluded from the 1987 Civil Jus-

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.62 (Vernon Supp. 1990).

tice Reform Act,[2] which also was known as "tort reform." The tort reform fight during the 70th Legislature was so intense that the conferees, in order to reach a compromise in the final hours, decided not to include the DTPA in tort reform.[3] However, the failure to make the DTPA subject to the changes in chapters 33 and 41 of the Texas Civil Practice and Remedies Code,[4] which concern comparative responsibility and exemplary punitive damages, left gaping loopholes in the tort reform legislation.[5] Thus, a cause of action under the DTPA could effectively thwart some of tort reform's new protections under chapters 33 and 41.[6]

By 1988, the application of the DTPA in the residential homebuilding industry had become the subject of extensive debate. With regard to residential homebuilding the DTPA was so onerous that a homebuilder's right to inspect an alleged residential construction defect could be thwarted.[7] The homebuilder's inability to conduct an inspection sometimes frustrated his settlement of a DTPA suit.

While these problems warranted limiting the scope of the DTPA, one area of needed expansion was its applicability to insurance companies.[8] By October, 1988, the Texas Senate State Affairs Committee launched a full-scale investigation of the State Board of Insurance, culminating in the replacement of the entire board. One of the chief complaints was that the State Board of Insurance had been particularly lethargic in referring insurance-related DTPA cases to the Texas Attorney General's office for prosecution.[9]

B. *The DTPA Interim Study Committee*[10]

In the final hours of the tort reform negotiations in 1987, the conferees removed DTPA from consideration in the reform package and agreed to study the issue during the interim.

The ensuing Joint Committee on Deceptive Trade Practices Act

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2. *See infra* Section II, note 45 and accompanying text.
3. *See infra* Section II, note 45 and accompanying text.
4. Act of June 16, 1989, ch. 2, §§ 22.03-.12, 1987 Tex. Gen. Laws 40, 40-46 (70th Leg., 1st Called Sess.).
5. *See infra* Section II, notes 45-49 and accompanying text.
6. TEX. BUS. & COM. CODE ANN. §§ 17.41-.62 (Vernon Supp. 1990).
7. *See infra* Section IV, notes 245-52 and accompanying text.
8. *See infra* Section III, notes 189-92 and accompanying text.
9. *See infra* Section III, notes 189-92 and accompanying text.
10. *See infra* Section II, notes 46-55 and accompanying text.

(generally referred to as the "interim committee") was a lively bunch of strange political bedfellows. Lt. Gov. William P. Hobby appointed the Senate side of the committee, which consisted of Sen. John T. Montford (D-Lubbock), co-chairman; Sen. O. H. "Ike" Harris (R-Dallas); Sen. Kent Caperton (D-Bryan); Morris Atlas, a defense lawyer with the McAllen firm of Atlas & Hall; Mike Gallagher, a plaintiff's lawyer with the Houston firm of Fisher, Gallagher, Perrin & Lewis; and Carol Barger, a consumer advocate.

House Speaker Gib Lewis chose Rep. Bruce Gibson (D-Godley), co-chairman; Rep. Steve Wolens (D-Dallas); Rep. Pat Hill (R-Dallas); Robert Sheehy, a defense attorney with Sheehy, Lovelace & Mayfield, Waco; John McAdams, an attorney with the Fort Worth firm of Jackson & Walker; and Joe Longley, an Austin attorney and one of the DTPA's "founding fathers."

As one Senate appointee observed, "If we get a consensus out of this group we should dispatch them to negotiate strategic arms limitations with the Russians."[11] By all indications, the interim committee was to be a polarized disaster. It was.

The committee heard much testimony about how this consumer protection legislation had evolved into an out-of-control legal hornet.[12] Witnesses not only confirmed that the Act was being used to circumvent tort reforms,[13] but also detailed the extremes to which the Act had been expanded by the courts.[14] There also was significant testimony from homebuilders reflecting their frustrations with the DTPA.[15]

As things digressed, the mood toward getting any consensus on the DTPA turned to one of hopelessness. Frustrated with the polarization of the committee and with little hope of obtaining a consensus report, on December 2, 1988, Senator Montford abruptly called the interim study to a halt and issued a short report:[16]

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11. Portions of Section I are based on unpublished personal notes and the memory of Senator Montford.

12. *See infra* Section II, notes 46-55 and accompanying text; *see also* JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg. (Jan. 1989).

13. *See infra* Section II, notes 49-55 and accompanying text.

14. *See* JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg., 66-98, 116-27, 176-88, 973-1056, 1075-1121, 1139-42, 1213-27 (Jan. 1989).

15. *Id.*

16. JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg., Findings and Recommendations & 41 (Jan. 1989).

> The Committee recommended in conformity with H.C.R. 137[17] that five copies of the legislative history of the DTPA and the tapes of the testimony and debate of the Committee be filed with the Legislative Reference Library, Texas Legislative Council, Secretary of the Senate, and Speaker of the House for the purpose of being made available to any interested person in connection with future legislation that might be proposed relating to deceptive trade practices.[18]

Thereafter, Senator Montford, the Civil Justice League, and other interested parties struck out on their own to prepare a strong DTPA reform bill. As it turned out, DTPA reform was rapidly overshadowed by worker's compensation reform in the 1989 regular legislative session and, in the view of some, was given little chance of passage.

C. *The Introduced Bills*

Senator Montford introduced three major DTPA reform bills in the 71st legislative session.[19] As filed, Senate Bill 437—and its companion, House Bill 965, sponsored by Rep. Chris Harris (R-Arlington)—would have comprehensively restuctured the entire Act.[20] Senate Bill 1012 applied reforms, DTPA and otherwise, to the retail homebuilding industry.[21] The insurance reform package, which gave the Texas Attorney General expanded powers to bring DTPA cases against insurance companies, became embodied in Senate Bill 255.[22]

D. *The Principal Players*

Anticipating that the real battleground on DTPA reform would be in the Senate, Senator Montford called upon those who had assisted with tort reform in 1987:[23] Morris Atlas; Will Barber, an attorney with Brown Maroney & Oaks Hartline in Austin; and Bob Duncan, an attorney with Crenshaw, Dupree & Milam in Lubbock. To this group Senator Montford added J. Clark Martin of Vinson & Elkins in

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17. Tex. H.R. Con. Res. 137, 70th Leg., 1987 Tex. Gen. Laws 4057, 4058-59.

18. JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg., Findings and Recommendations & 41 (Jan. 1989).

19. *See infra* Section II, note 54.

20. *See infra* Section III, notes 134-44 and accompanying text.

21. *See infra* Section IV.

22. *See infra* Section II, subsection E; *see also* JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg., 172-74, 1143-1221 (Jan. 1989).

23. *See* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 1*, 25 HOUS. L. REV. 59, 90-91 (1988).

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Houston. Assisted by Roger Miller, Austin lobbyist Robert Spellings spearheaded the Civil Justice League's efforts with Ron Kessler and Lucia Wyman of the Austin office of Jones, Day, Reavis & Pogue.

Just as with torts, the man to reckon with on the Senate floor was Senator Caperton. Unlike Senator Montford, however, Senator Caperton needed only to activate Longley. Longley was a formidable adversary, having helped write the DTPA, as well as one book[24] and many commentaries on it. He seemed to have everyone's proxy on the consumer side, as well as that of the Texas Trial Lawyers Association. As the 71st Session proceeded, Longley blocked and stalled Senate Bill 437 reform bill at every turn. His strategy was simple: delay the bill until it was too late in the session to pass.

The DTPA reform bills sponsored by Representative Harris quickly passed in the more business-conscious Texas House of Representatives. Only Rep. Steve Wolens (D-Dallas), with his basic understanding of the DTPA, seemed to pose a real challenge to any DTPA reform bill on the House floor.

The Senate was a different story. Longley first succeeded in bottling up Senate Bills 437 and 1012 in the Senate Jurisprudence Committee and one of its subcommittes. The vote of the chairman, Sen. Robert Glasgow (D-Stephenville), was needed to get the bills out of committee. Otherwise, the bills were dead. Eventually, Senator Montford prevailed on Senator Glasgow to vote the bills out to the floor, but not without an intensive personal lobbying effort. Finally, on April 20, 1989, the bills were reported out of committee by a 4 to 3 vote.[25]

With Senate Bills 437 and 1012 poised at the threshhold of the Senate floor, Longley cleverly changed his tactics. He labeled the DTPA reform package the "Consumer Destruction Act" and was relentless in his opposition.[26] His tactics worked; Senator Montford could not get the 21 votes necessary to suspend the Senate rules so that Senate Bill 437 could be considered on the Senate floor.[27]

But Senator Montford's strategy was also simple: to divide and con-

24. D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION (2d ed. 1983).

25. S.J. OF TEX., 71st Leg., Reg. Sess. 872 (1989).

26. *See supra* note 24.

27. *See* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 1*, 25 HOUS. L. REV. 59, 83-84 n.11 (1988).

quer. However, when he asked the homebuilders to pull out all of the stops in lobbying for passage of Senate Bill 1012, he found himself in the unenviable position of reporting that bill out of the Senate,[28] but unable contemporaneously to get the necessary 21 votes to pass Senate Bill 437. This brought Senator Montford and others to the negotiating table.

E. *An Ill-Advised Compromise*

Hindsight is always better than foresight and the same holds true for legislative decisions. Senator Montford was so determined to get a DTPA reform bill that he compromised with Senator Caperton and Longley to plug the tort reform loophole in exchange for removing the $5 million waiver provision enacted in 1983 as an amendment to section 17.42 of the DTPA and the $25 million cap for the definition of "consumer" in Section 17.45. This ill-advised compromise might have doomed any chance at passage of Senate Bill 437. As one member so aptly put it: "Large companies don't want other large companies to be able to sue them under the DTPA for lying, cheating, and stealing."[29]

When the compromise Senate Bill 437 was taken up on the floor, Sen. Don Henderson (R-Houston), who had been involved in the 1983 passage of the $5 million consumer waiver provision and the $25 million cap for the definition of "consumer," vigorously challenged its removal from the DTPA, but to no avail.[30] On May 12, 1988, Senate Bill 437 passed the Senate.[31]

A deal's a deal, but Senator Montford was so disenchanted by developments at that point that he told Longley he would let Senate Bill 437 die since he was not going back on his word. "Makes one suspicious of the big boys' paranoia," Senator Montford angrily quipped in a debate.[32] Because of the outcry from "big business," whose spokespersons seemed horrified by the thought of being sued by each other for DTPA violations, Senate Bill 437 appeared to be doomed.

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28. S.J. OF TEX., 71st Leg., Reg. Sess. 1230-31 (1989).
29. *See supra* note 11.
30. S.J. OF TEX., 71st Leg., Reg. Sess. 1348-51 (1989).
31. *Id.*
32. *See supra* note 11.

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F. *Passage at Last*

In the meantime, Longley, who may have out-negotiated his adversaries on Senate Bill 437, apparently began to reweigh his options. He knew Senator Montford would always honor a "deal." So, for all practical purposes, DTPA reform, except as it applied to the retail homebuilding industry, may have been dead at Longley's option for the 71st Session—unless the mutually respectful legislative working relationship between Senators Montford and Caperton was enough to override that option. Whatever Longley's motivations, he reopened negotiations, agreed to keep the $5 million waiver in place, restore the $25 million cap for the definition of "consumer," and stood aside for Senate Bill 437 to pass both houses and be sent to the governor.[33]

G. *The Enacted Bills*

The homebuilders fared well with Senate Bill 1012.[34] Under Senate Bill 255, the Texas Attorney General for the first time can institute DTPA suits without being blocked by the commissioner or the State Board of Insurance.[35]

As a general reform bill, the Senate Bill 437 that was enacted was a far cry from what was initially introduced.[36] It is, however, a meaningful piece of DTPA reform. It effectively plugs the tort reform loophole and prevents the DTPA from being used as a vehicle to thwart tort reforms in DTPA claims/suits seeking damages for death or the tort-type personal injuries and property damage covered by the 1989 DTPA amendment.[37] It enables waiver of the DTPA for the first time on a qualifying transactional basis.[38] It makes fairer various provisions relating to notice, inspection, and settlement offers.[39]

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33. S.J. OF TEX., 71st Leg., Reg. Sess. 3343-46 (1989); *see also* H.J. OF TEX., 71st Leg., Reg. Sess. 2511, 2259, 3456 (1989).
34. *See infra* Section IV.
35. *See infra* Section III, subsection E.
36. *See infra* Section III, notes 194-210.
37. *See infra* Section II.
38. *See infra* Section III, subsections C and G & Appendix I.
39. *See infra* Section III, subsection D.

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SECTION II
CLOSING THE DTPA LOOPHOLE IN THE 1987 TORT REFORM LAWS

A. *Synopsis of the 1989 DTPA Law Closing the 1987 DTPA-Tort Reform Loophole*[40]

The portion of the 1989 DTPA reform laws[41] that closes the DTPA loophole in the 1987 tort reform laws[42] amends section 17.50(b)(1) of the Business and Commerce Code[43] and

(1) applies the tort reform provisions in chapter 33 of the Civil Practices and Remedies Code that provide for (a) percentage of responsibility findings, (b) barred or reduced damages, (c) thresholds to joint and several liability, (d) settlement credits, and (e) contribution among non-settling parties and non-parties to DTPA claims and suits seeking damages for death and tort-type personal injury or property damage;

(2) allows the fact finder to consider any defense or defensive matter (e.g., contributory negligence, assumption of risk, misuse, mitigation of damages, etc.) that could be considered in a chapter 33 action when determining the percentage of responsibility attributable to the consumer claimant in a tort-type DTPA claim or suit; and

(3) applies, to tort-type DTPA claims/suits, the tort reform provisions in chapter 41 that (a) prescribe gross negligence, malice, and fraud (as statutorily defined) as the only bases upon which exemplary or punitive damages may be recovered by a DTPA claimant in such DTPA claims/suits; (b) modify and tighten prior law regarding gross negligence as a basis for exemplary/punitive damages; (c) limit the recoverable amount of those damages to the greater of $200,000 or four times actual damages; and (d) relate to the claimant's burden of proof, no joint and several liability, no prejudgment interest, and no recovery if only nominal damages are awarded or if multiple damages under another statute are elected.

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40. Act of June 14, 1989, ch. 380, § 2, 1989 Tex. Sess. Law Serv. 1490 (Vernon)(amending TEX. REV. CIV. STAT. ANN. art. 17.50(b)(1)).

41. *See supra* Section I, note 1.

42. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.002(b)(2), 41.002(b)(1) (Vernon Supp. 1990); *see also* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 265 (1988).

43. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987 & Supp. 1990).

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B. *Background of the 1989 DTPA Amendments*

The tort reform battle waged during the 70th Legislature's 1987 Regular and First Called sessions precipitated the DTPA reform achieved in the 1989 Regular Session of the 71st Legislature. Senator Montford, the principal author involved in both legislative processes,[44] has chronicled the background as follows:

> [During the last hours of the regular session the] conferees were down to three issues. A 'sixty' vs. 'sixty-one' percent bar rule against recovery in products or strict liability cases, a 'twenty' vs. 'twenty-one' percent threshold for joint and several liability, and a 'ten' vs. 'eleven' percent joint and several liability threshold where the plaintiff was without fault. [Lt. Gov.] Hobby asked [Senator] Caperton to step back into his office. I will never know what [Lt. Gov.] Hobby said to him, but whatever it was, [Senator] Capterton returned, uttered a heavy sigh, and said he would go with the House percentages if we would exclude the Deceptive Trade Practices Act from the provisions of the tort reform package. At that time it was agreed that the Deceptive Trade Practices Act would be the subject of an interim study.[45]

Most who were appointed to the interim DTPA study committee were involved in the 1987 tort reform legislative process.[46] The most important DTPA issues adopted by the interim committee for study were:

> 1. DTPA and the 1987 Tort Reform Laws
>
> To what extent, if any, should the DTPA exemptions in the 1987 tort reform laws be repealed or otherwise modified. In other words, should the DTPA be allowed to preclude the uniform application of the 1987 tort reform laws to actions for personal injury, death, or property damage or a professional liability action? . . .
>
> . . . .
>
> (d) Does the lack of uniformity in actions for personal injury, death, or property damage and/or professional liability actions to which both the DTPA and the 1987 tort reform laws apply give rise to any unfairness, unpredictability, and/or complexity in those claims/suits? Specifically, should the 1987 Texas Tort Reform Laws (e.g., provisions

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44. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(b)(2) (Vernon 1989); *see also* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 1*, 25 HOUS. L. REV. 59, 80, 98 (1988).

45. Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System—Part 1*, 25 HOUS. L. REV. 59, 98 (1988).

46. *See* JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg. (1987).

relating to comparative responsibility and joint and several liability) apply uniformly to:
— All actions to recover damages for personal injury, death and/or property damage without an exemption based on the extent to which such actions are brought under the Texas DTPA?
— All professional liability actions for other harm without a DTPA exemption?[47]

The committee held five meetings during 1988 and received testimony or written materials on many DTPA reform issues from approximately forty witnesses.[48] The testimony and materials that favored closing the DTPA loophole in the 1987 tort reform laws emphasized uniformity and fairness when damage claims are filed due to death, or tort-type personal injury and property damage.[49] Illustrative is the following:

> Probably the most striking example of a problem with the specific operation of [the Texas] DTPA is the exception carved out of the 1987 tort reforms. . . . Present law allows many plaintiffs to bring a DTPA action alleging that serious personal injury, death, or property damage was caused by a defect in a product. . . . [T]hat kind of DTPA claim has to be litigated as if the Texas Legislature had never passed the comparative responsibility rules and other reforms in 1987.
>
> Every other legal claim set forth in a products liability suit is subject to those 1987 reforms, but not a DTPA claim. . . .[Is it] fair or just for some of the reforms enacted last session to be so easily circumvented in ordinary products liability cases—by merely pursuing them in the guise of DTPA claims[?] . . . Surely not. Surely the meaningful tort reform enacted by the 70th Legislature should not have a loophole that so significantly undermines the substance of what took so much time and effort to accomplish in 1987.[50]

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47. *Id.* at 7, 27.

48. *Id.* at 221-32, 899-1236.

49. *See The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 1-3, 22-24 (Mar. 22, 1989)(testimony and written materials presented by Dewey J. Gonsoulin of Mehaffey, Weber, Keith & Gonsoulin, Beaumont, and by Brock C. Akers, Chairman, Deceptive Trade Practices Legislative Committee, Texas Association of Defense Counsel); *see also* JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg. 141-51, 218-26, 899-913, 949-71 (1987)(testimony and materials presented on behalf of Texas Association of Defense Counsel and Texas Civil Justice League); Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 1*, 25 HOUS. L. REV. 59, 69 n.68, 82-83 nn.7-8 (1988)(describing Texas Civil Justice League).

50. JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg. 953-54 (1989).

> For those unhappy with the gains made in the 1987 Tort Reform package, it is also easy to understand why many would prefer to leave the DTPA loophole available. [I]f you[51] . . . . remove the loophole, . . . you will restore a sense of fairness and balance to our Texas Judicial System.[52]
>
> . . . .
>
> . . . [W]hat all of this shows is that the DTPA . . . has created a lack of uniformity where the same facts with different theories produce totally different results. . . . The DTPA loophole and the tort reform act make[s] the gains of tort reform capable of being easily and quickly side-stepped. That loophole should be closed.[53]

The reform bill, which Senator Montford sponsored and introduced during the 71st Legislature, addressed the lack of uniformity and unfairness caused by the DTPA loophole in the 1987 tort reform laws.[54] During the initial hearing on the DTPA reform bill Senator Montford emphasized: "The DTPA reform bill would prevent the Deceptive Trade Practices Act from being used as a loophole to circumvent the 1987 Tort Reforms that we all worked so hard on, in effecting a meaningful solution to those problems."[55]

C. *The New DTPA Law for Claims/Suits Seeking Damages for Death or Tort-Type Personal Injury or Property Damage: Text and Commentary*

1. Text of DTPA Section 17.50(b)(1), as amended in 1989[56]

Section 17.50(b)(1) was amended as follows:

> (b) In a suit filed under this section, each consumner who prevails may obtain:
> (1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award

51. *Id.* at 13-15.

52. *Id.* at 141-43.

53. *Id.* at 219-20.

54. *The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 1-3, 22-24 (Mar. 22, 1989)(testimony by Dewey J. Gonsoulin and Brock C. Akers on behalf of Texas Civil Justice League and Texas Association of Defense Counsel)(transcript of tape 1 available from Senate Staff Services).

55. *Id.* at 3.

56. TEX. BUS. & COM. CODE § 17.50(b)(1) (Vernon Supp. 1990). The italicized portion of this text of DTPA section 17.50(b)(1) was added as part of the 1989 DTPA reform laws. *Id.*

not more than three times the amount of actual damages in excess of $1,000, *provided that:*
(A) the provisions of Chapters 33 and 41, Civil Practice and Remedies Code, shall govern the determination of the consumer's right under this subchapter to recover actual and other damages, including exemplary damages, and the amount of those damages that may be recovered by the consumer under this subchapter, in an action seeking damages for (i) death; (ii) personal injury other than mental anguish or distress associated with a violation of this subchapter that does not involve death or bodily injury; or (iii) damage to property other than the goods acquired by the purchase or lease that is involved in the consumer's action or claim if that damage arises out of an occurrence that involves death or bodily injury; and
(B) only in an action under this subchapter that is subject to Paragaph (A) of this subdivision, the consumer's right to recover damages shall be subject to any defense or defensive matter that could be considered by the trier of fact in an action subject to Chapter 33, Civil Practice and Remedies Code, in determining the percentage of responsibility attributable to the consumer claimant under that chapter.

2. Commentary on 1989 Amendment to Section 17.50(b)(1)

a. Purpose

The purpose of the 1989 amendment to DTPA section 17.50(b)(1) is to close the DTPA loophole in the 1987 tort reform laws and thereby bring fairness and uniformity to claims and suits seeking damages for death or the kind of personal injury or property damage covered by the amendment.[57]

b. Tort Reform Laws Relating to Comparative Responsibility and Exemplary Damages Made Applicable to DTPA Claims

(i) Applicability Dependent on Type of Damages Sought

The 1989 amendment to DTPA section 17.50(b)(1) applies the 1987 tort reform laws relating to comparative responsibility in chapter 33[58] and exemplary damages in chapter 41[59] to DTPA claims and suits (hereafter generally referred to as "tort-type DTPA

57. *See supra* notes 44-55 and accompanying text.
58. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.016 (Vernon Supp. 1990).
59. *Id.* §§ 41.001-.009.

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claims/suits") in which the consumer claimant seeks damages for:[60]

(a) "death"[61]

This category of DTPA claims/suits to which the tort reform chapters 33 and 41 regarding comparative responsibility and exemplary damages apply is self-explanatory and unqualified.

(b) "personal injury other than mental anguish or distress associated with a violation of this subchapter that does not involve death or bodily injury"[62]

Under this category tort reform chapters 33 and 41 apply to all but one type of DTPA claims/suits for "personal injury." That one type is where—without any bodily injury or death being involved—the consumer seeks damages for mental anguish or distress that are associated with a DTPA violation.

Hypothetical #1. While driving his own automobile, a consumer is injured in a one-car accident caused by defective brakes. The consumer sues the manufacturer on the basis of strict products liability,[63] breach of warranty,[64] and DTPA violation.[65] Since the asserted DTPA violation involves bodily injury, the consumer's personal injury claim and the DTPA claim are governed by the tort reform laws relating to comparative responsibility and exemplary damages.

Hypothetical #2. A consumer sues an automobile manufacturer and dealer asserting that his car is a "lemon" with defective brakes, among other defects. On the basis of breach of implied warranty[66]

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60. *See The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 22-24 (Mar. 22, 1989)(transcript of tape 1 available from Senate Staff Services).

61. TEX. REV. CIV. STAT. ANN. art. 17.50(b)(1)(A)(i) (Vernon Supp. 1990).

62. *Id.* art. 17.50(b)(1)(A)(ii).

63. RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* L. A. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789-90 (Tex. 1967).

64. TEX. BUS. & COM. CODE ANN. §§ 2.314-.315 (Vernon 1968)(implied warranties of merchantability and fitness); *see also* International Armament Corp. v. King, 686 S.W.2d 595, 599 (Tex. 1985); Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 459-63 (Tex. 1980).

65. TEX. BUS. & COM. CODE ANN. §§ 17.46(5), (7), 17.50(a)(1)-(2) (Vernon 1987); *see also* Keller Indus., Inc. v. Reeves, 656 S.W.2d 221, 224-25 (Tex. Civ. App.—Austin 1983, writ ref'd n.r.e.); Mahan Volkswagen, Inc. v. Hall, 648 S.W.2d 324, 331-33 (Tex. Civ. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

66. TEX. BUS. & COM. CODE ANN. §§ 2.314-.315 (Vernon 1968)(implied warranties of merchantability and fitness); *see also* Mercedes-Benz of N. Am., Inc. v. Dickenson, 720 S.W.2d 844, 848 (Tex. App.—Fort Worth 1986, no writ)(breach of implied warranty case).

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and DTPA,[67] the damages sought by the consumer include mental anguish and distress. The consumer and his car have not been in an accident. Because there is no bodily injury, the exception in DTPA section 17.50(b)(1)(A)(ii) does not require application of the tort reform laws relating to comparative responsibility and punitive damages. In this instance the pre-1989 DTPA law governing this type of DTPA claim/suit is unchanged.[68]

(c) "damage to property other than the goods acquired by the purchase or lease that is involved in the consumer's action or claim if that damage arises out of an occurrence that involves death or bodily injury"[69]

There are two qualifiers in this category of DTPA claims/suits involving property damage. First, damage to the consumer good itself (e.g., the automobile, home, etc. purchased or leased by the consumer) is not subject to the tort reform chapters 33 and 41.[70] Second, only damage to property that arises out of an occurrence involving death or bodily injury is subject to those reforms. This is a legislatively negotiated dividing line between tort-type property damage—to which the comparative responsibility and punitive damages provisions of tort reform laws should and do apply—and consumer-type property damage caused by a DTPA violation, but not involving the tort earmark of personal injury or death to which the tort reform laws, under the 1989 DTPA amendment, do not apply.

Hypothetical #3. In the hypothetical #1 situation, the consumer's one-car accident damages contents of the car and the garage of the consumer's home. Because there is bodily injury, the consumer's claim for damage to the contents and garage is subject to the tort reform laws relating to comparative responsibility and exemplary damages, but his claim for damage to the car (the consumer good) is not.

Hypothetical #4. If in hypothetical #3 the consumer did not sus-

67. TEX. BUS. & COM. CODE ANN. §§ 17.46(5), (7), 17.50(a)(1)-(2) (Vernon 1987); *see also Mercedes-Benz*, 720 S.W.2d at 848 (dealer sued under DTPA for selling car with defects).

68. *See* Kold-Serve Corp. v. Ward, 736 S.W.2d 750, 754-55 (Tex. App.—Corpus Christi 1987)(citing Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 117 (Tex. 1984)), *writ dism'd by agreement*, 748 S.W.2d 227 (Tex. 1988).

69. TEX. REV. CIV. STAT. ANN. art. 17.50(b)(1)(A) (Vernon Supp. 1990).

70. *See The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing On Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 22 (Mar. 22, 1989)(transcript of tape 1 available from Senate Staff Services).

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tain any bodily injury, the tort reform laws would not be applicable to any aspect of the consumer's DTPA claim for property damage.

(ii) Applicability Not Dependent on Type of DTPA Violation Asserted

Because the purpose of the 1989 amendment to DTPA section 17.50(b)(1) is to close the DTPA loophole in the 1987 tort reform laws relating to comparative responsibility and punitive damages, and to bring fairness and uniformity to the tort-type DTPA claims/suits discussed above,[71] the amendment provides that those tort reforms shall govern the determination of

> the consumer's right under this subchapter [i.e., the DTPA] to recover actual and other damages, including exemplary damages, and the amount of those damages that may be recovered by the consumer under this subchapter, in an action seeking damages for [death or the types of personal injury or property damage covered by the amendment].[72]

Accordingly, all such damage suits—regardless of the legal theories upon which they are based (e.g., strict tort liability, strict products liability, breach of warranty, and/or violation of DTPA section 17.46(b))—now will be uniformly and fairly governed by the same tort reform laws regarding comparative responsibility and exemplary damages.[73]

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71. *See supra* notes 58-69 and accompanying text.

72. TEX. REV. CIV. STAT. ANN. art. 17.50(b)(1)(A) (Vernon Supp. 1990).

73. Authors who are more accustomed to writing in the DTPA field than in the tort domain appear to suggest that under the 1989 amendment to DTPA section 17.50(b)(1) the provisions of tort reform chapters 33 and 41 govern a damage claim made under the DTPA for death or the tort-type personal injury or property damage covered by the amendment only if the claim is based on a breach of warranty under DTPA section 17.50(a)(2). *See* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION §§ 8.03, 8.05 (2d ed. 1983 & Supp. 1989). The authors of this article submit that such a strained interpretation misconstrues the 1989 amendment and is contrary to the amendment's legislative purpose. *See supra* notes 44-55 and accompanying text. The amendment explicitly provides that those tort reform laws "shall govern" the determination of "the consumer's right under this subchapter [i.e., the DTPA]," not just under section 17.50(a)(2) of "this subchapter," to recover damages in actions for death and the tort-type of personal injury and property damage described in the amendment. Moreover, the plain language of the amendment describes the applicability of chapters 33 and 41 in terms of the injury/damage involved, not the legal theory asserted. *See supra* notes 58-69 and accompanying text. To misinterpret the amendment as applicable only insofar as a breach of warranty is asserted flies in the face of the legislative purpose of achieving uniformity and fairness with respect to such claims/suits. *See supra* notes 58-69 and accompanying text; *see also infra* Section III, note 123.

c. Incorporating Tort Reform Chapter 33 - Comparative Responsibility Into the DTPA

By providing that the provisions of tort reform chapter 33 "shall govern" the determination of both the consumer's right "under this subchapter" (i.e., under the DTPA) to recover actual damages and the amount of those damages that may be recovered "under this subchapter" in tort-type DTPA claims/suits, and by further providing that in such claims and actions the consumer's right to recover damages "shall be subject to any defense or defensive matter" that could be considered by a jury in a chapter 33 action "in determining the percentage of responsibility attributable to the consumer claimant," the 1989 DTPA amendment incorporates the comparative responsibility provisions of chapter 33 into the DTPA.[74] This integration of tort reform and DTPA reform makes the following provisions of chapter 33 controlling in tort-type DTPA claims/suits:[75]

(1) Chapter 33 defines "percentage of responsibility" as that which the trier of fact attributes to each consumer claimant and defendant and any settling person with respect to causing or contributing to cause in any way the personal injury, death, property damage, or other harm for which recovery is sought.[76]

(2) Chapter 33 mandates that the trier of fact determine the percentage of responsibility of each consumer claimant, defendant, and any settling person.[77]

(3) Chapter 33 reduces the amount of damages recoverable by the claimant by a percentage equal to the consumer claimant's percentage of responsibility,[78] unless that percentage of responsibility exceeds the

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74. TEX. BUS. & COM. CODE § 17.50(b)(1) (Vernon Supp. 1990).

75. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.016 (Vernon Supp. 1990). For a discussion of this portion of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 247-312 (1988).

76. TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(4) (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 272-75 (1988).

77. TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest For a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 266-69 (1988).

78. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (Vernon 1989). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Re-*

bar level set forth in chapter 33 (e.g., "60 percent bar").[79]

Hypothetical #5. In the hypothetical #1 situation (i.e., while driving his own automobile, a consumer is injured in a one-car accident caused by defective brakes), the consumer sues the manufacturer on the basis of strict products liability, breach of warranty, and DTPA violation.[80] The jury finds DTPA liability and producing cause against the manufacturer defendant, contributory negligence and proximate cause against the consumer claimant/driver, and $100,000 damages. In its comparative responsibility finding[81] the jury attributes 40 percent to the consumer and 60 percent to the manufacturer. Under tort reform section 33.012(a), together with DTPA section 17.50(b)(1)(A) and (B), the consumer claimant is entitled to recover $60,000 as his proportionately reduced damages. The same result would be reached if the jury also found liability against the manufacturer on the basis of strict products liability and/or breach of warranty.

Hypothetical #6. In the preceding hypothetical, if the comparative responsibility findings are reversed (i.e., consumer claimant 60 percent, manufacturer defendant 40 percent), the consumer claimant is precluded from recovering any of the $100,000 damages by reason of the 60 percent bar provision in tort reform section 33.001(b), together with DTPA section 17.50(b)(1)(A) and (B). The same result would be reached if the jury also found liability against the manufacturer on the basis of strict products liability and/or breach of warranty.

(4) Chapter 33 limits joint and several liability to defendants whose percentage of responsibility is greater than 20 percent when the consumer claimant's responsibility is 1 percent or more, or is greater than 10 percent when no responsibility is attributed to the consumer claimant (i.e., "21 percent/11 percent threshold").[82]

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form: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2, 25 HOUS. L. REV. 245, 276 (1988).

79. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(b) (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 253-62 (1988).

80. *See supra* notes 63-67.

81. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001(b), 33.003 (Vernon Supp. 1990).

82. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.013(a), (b)(1), (c)(1) (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 281-88 (1988).

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Hypothetical #7. As in hypothetical #1 (i.e., while driving his own automobile, a consumer is injured in a one-car accident caused by defective brakes), the consumer sues the manufacturer on the basis of strict products liability, breach of warranty, and DTPA violation, and sues a dealer on the basis of negligent repair of the brakes. The jury finds DTPA liability and producing cause against the manufacturer defendant, negligence and proximate cause against the dealer defendant, contributory negligence and proximate cause against the consumer claimant/driver, and $100,000 damages. In its comparative responsibility finding the jury attributes 40 percent to the consumer claimant, 55 percent to the manufacturer defendant, and 5 percent to the dealer defendant. Under tort reform section 33.013(a), together with DTPA section 17.50(b)(1)(A) and (B), the 5 percent defendant is severally liable for only $5,000 and not liable, jointly or otherwise, for the additional $55,000 that the consumer claimant is entitled to recover. Under tort reform section 33.013(b)(1), together with DTPA section 17.50(b)(1)(A) and (B), the 55 percent defendant is not only severally liable for $55,000, but also jointly liable for the additional $5,000.

(5) Chapter 33 provides a credit to nonsettling defendants (at the election of any one defendant, binding on all, filed before submission of the case to the trier of fact) that is either: (a) a dollar-for-dollar credit equal to the sum of all settlements, or (b) an amount calculated on a statutory sliding scale of 5 percent to 20 percent of the claimant's damages, irrespective of anyone's percentage of responsibility.[83]

Hypothetical #8. As in the hypothetical #7 situation (i.e., a consumer owner/driver injured in a one-car accident caused by defective brakes sues the manufacturer on the basis of strict products liability, breach of warranty, and DTPA violation and also the dealer on the

83. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.012(b)-(c), 33.014 (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 277-81, 291-92 (1988). The primary legislative purpose of the tort reform "sliding scale credit" provision (tort reform section 33.012(b)) is to encourage more settlements by claimants so as to save litigation costs in the Texas civil justice system as a whole. *Id.* at 279-80. The sliding scale credit is 5 percent of the first $200,000, 10 percent of the next $200,000, 15 percent of the next $100,000, and 20 percent of the next $500,000 (e.g., a $5,000 credit against $100,000 damages/judgment and a $145,000 credit against $1,000,000 damages/judgment). *Id.* at 277-79. As a practical matter, this credit tends to come out better for nonsettling defendants in relatively small dollar settlements than in large ones. *Id.* at 292, 308-31.

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basis of negligent repairs), the consumer settles during trial with the dealer for $10,000. The nonsettling manufacturer may elect (provided it is done in writing and filed before the case is submitted to the jury) either a dollar-for-dollar $10,000 credit or the sliding scale credit (5 percent to 20 percent), the amount of which would be unknown at the time of election. If the nonsettling manufacturer does not file a pre-submission election, an election of the sliding scale credit is deemed to have been made.[84] Therefore, a $100,000 damage finding by the jury would result in a $5,000 sliding scale credit (i.e., 5 percent of $100,000).

(6) Chapter 33 provides statutory rights to a liable defendant to obtain proportionate contribution from other liable defendants,[85] and to any defendant to implead solely for contribution purposes a nonsettling, not-sued party, with the trier of fact to determine that party's percentage of responsibility in a separate finding from the one that determines whether a consumer claimant's recovery is proportionately reduced or barred and/or a defendant is jointly and severally liable.[86]

Hypothetical #9. Suppose in hypothetical #7 situation, the consumer owner/driver neither settles with nor sues the dealer who sold him the car. Under tort reform section 33.016 the defendant manufacturer may join the dealer as a "contribution defendant" and thereby seek contribution for a portion of damages for which the dealer may be liable under a comparative percentage finding. In that event two comparative responsibility questions would be submitted to the jury for percentage findings: (1) as between the consumer claimant and the manufacturer in one question, and (2) as between the manu-

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84. TEX. CIV. PRAC. & REM. CODE ANN. § 33.014(a) (Vernon Supp. 1990); *see also* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 291-92 (1988)(where there are multiple defendants, election by one binds all on "first-come, first-served" approach, and resulting credit is shared portionately among non-settling liable defendants).

85. TEX. CIV. PRAC. & REM. CODE ANN. § 33.015 (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 292-95 (1988). For multiple nonsettling defendants who are jointly and severally liable to the claimant, tort reform section 33.015 results in proportionate responsibility among those who satisfy the claimant's judgment. *Id.*

86. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.016-.017 (Vernon Supp. 1990). For discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 295-98 (1988).

facturer and dealer in the other question.[87] The jury's percentage responsibility findings in the "one pie" submission in hypothetical #7, was 40 percent claimant, 55 percent manufacturer, and 5 percent dealer.

Under a "two pie" submission for contribution purposes in this situation, the findings might be as detailed in the following hypotheses.

Hypothetical #9A.

Question A-1: 40 percent consumer claimant
60 percent manufacturer

Question A-2: 90 percent manufacturer (contribution)
10 percent dealer

Hypothetical #9B.

Question B-1: 45 percent claimant
55 percent manufacturer

Question B-2: 90 percent manufacturer (contribution)
10 percent dealer

In hypothetical #9A, the consumer claimant recovers $60,000 from the manufactuer, who in turn recovers $6,000 in contribution from the dealer. In hypothetical #9B, these figures change to $55,000 for the claimant's recovery from the manufacturer, and $5,500 for the dealer's contribution to the manufacturer.

Prior to the 1989 amendment to DTPA section 17.50(b)(1), none of the foregoing 1987 tort reform provisions applied to a DTPA claim or action.[88] Now, these provisions apply to all DTPA claims or actions begun on or after September 1, 1989 (the effective date of the 1989 DTPA amendment)[89] in which the DTPA claimant seeks damages for death or the tort-type personal injury or property damage covered by the 1989 DTPA amendment.[90]

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87. *See id.* at 295-98 (section 33.016(b) allows contribution finding between defendant and non-party). Note that under tort reform laws (sections 33.003, 33.011, 33.015, 33.016), the consumer claimant has contol over whose conduct, both parties and nonparties, is submitted to the jury for a determination of comparative responsibility percentage findings for bar and/or threshold purposes. *Id.* at 266-67, 269-70, 272, 295-98; *see also* TEX. CIV. PRAC. & REM. CODE §§ 33.003, 33.011, 33.015, 33.016 (Vernon Supp. 1990).

88. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(2) (Vernon Supp. 1990); *see also* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 265 (1988)(discussion of DTPA loophole in 1987 tort reform laws).

89. Act of June 14, 1989, ch. 380, § 6, 1989 Tex. Sess. Law Serv. 1493 (Vernon); *see also infra* notes 114-116 and accompanying text.

90. TEX. REV. CIV. STAT. ANN. art. 17.50(b)(1)(A) (Vernon Supp. 1990).

d. Incorporating Tort Reform Chapter 41 - Exemplary/Punitive Damages Into the DTPA

The 1989 DTPA amendment incorporates the tort reform chapter 41, which addresses exemplary damages into the DTPA. It provides that the exemplary damages provisions "shall govern" the determination of both the consumer's right "under this subchapter" (i.e., under the DTPA) to recover exemplary damages. It also governs the amount of those damages that may be recovered "under this subchapter" in DTPA claims/suits seeking damages for death or the kind of personal injury or property damage covered by the 1989 amendment.[91] This integration of tort and DTPA reforms makes the following provisions of chapter 41 controlling in such tort-type DTPA claims/suits.[92]

(i) Limiting the Amount Of Recoverable Exemplary Or Punitive Damages

Chapter 41 limits the amount of recoverable exemplary or punitive damages to the greater of $200,000 or four times actual damages.[93]

Hypothetical #10. In a hypothetical #5 situation (i.e., a consumer owner/driver injured in a one-car accident caused by defective brakes sues the manufacturer on the basis of strict products liability, breach of warranty, and DTPA violation), the consumer claimant sues for exemplary damages in addition to compensatory damages. The jury finds liability for compensatory damages on the basis only of DTPA violation, liability for exemplary damages on the basis of gross negligence, actual damages of $100,000, and exemplary damages of $1,000,000. Since under DTPA section 17.50(b)(1)(A) exemplary damages for gross negligence are now recoverable for a DTPA violation but are capped at four times actual damages, the consumer claimant recovers $400,000 instead of $1,000,000 as exemplary damages. It

91. TEX. BUS. & COM. CODE § 17.50(b)(1) (Vernon Supp. 1990).

92. TEX. BUS. & COM. CODE § 17.50 (Vernon Supp. 1990). For a discussion of this portion of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 314-41 (1988).

93. TEX. CIV. PRAC. & REM. CODE ANN. § 33.008 (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 335-39 (1988). Under section 41.008 no limitation applies to exemplary damages resulting from malice or an intentional tort. *Id.* at 339.

should be noted that "additional" damages under DTPA section 17.50(b)(1), which are predicated on a "knowing" finding[94] and are subject to a "three times" limitation,[95] are no longer recoverable in DTPA claims and suits for damages for death and the tort-type of personal injury and property damage covered by the 1989 DTPA amendment.

Hypothetical #10A. In a hypothetical #5 situation, the jury finds $25,000 actual damages and $250,000 exemplary damages (instead of $100,000/$1,000,000). Since $200,000 is greater than four times actual damages (i.e., 4 × $25,000 = $100,000), under tort reform section 41.007 together with DTPA, section 17.50(b)(1)(A) and (B), the consumer claimant may recover up to, but not exceeding, $200,000 as exemplary damages.[96] In this instance the consumer plaintiff recovers $200,000, not $250,000, as exemplary damages.

Hypothetical #10B. In a hypothetical #5 situation, the jury finds $10,000 actual damages and $100,000 exemplary damages. Since $200,000 is greater than four times actual damages (i.e., 4 × $10,000 + $40,000), under tort reform section 41.007, together with DTPA section 17.50(b)(1)(A) and (B), the consumer claimant recovers the $100,000 exemplary damages awarded by the jury even though that amount is ten times actual damages.[97] The amount of recoverable exemplary damages in this instance is $100,000, not $200,000.[98]

(ii) Limiting Recovery of Exemplary Damages To Specific Grounds[99]

In tort-type DTPA claims/suits fraud, malice, and gross negligence are now the only grounds upon which any damages other than actual

94. TEX. BUS. & COM. CODE ANN. §§ 17.45(9), 17.50(b)(1) (Vernon 1987).

95. *Id.* § 17.50(b)(1).

96. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1990); *see also* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 335-37 (1988).

97. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1990).

98. *Id.* Authors in the DTPA field suggest that the $200,000 provision in tort reform section 41.007 be construed as a "minimum" recovery provision instead of an "up-to-but-not-exceeding" limitation. D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 8.05 (2d ed. 1983 & Supp. 1989). This misreads tort reform section 41.007 and misperceives the law's purpose. *See* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 337-38 (1988).

99. TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001(4)-(6), 41.003 (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987*

(i.e., compensatory) can be awarded.[100] "Additional" damages (i.e., DTPA "treble" damages) under DTPA section 17.50(b)(1), which are predicated on a "knowingly" finding, are not permitted, under the new subsections (A) and (B) to that section, in tort-type DTPA claims/suits.[101]

(iii) Modification of Prior Common Law Regarding Gross Negligence As Basis For Recovering Exemplary Damages[102]

Under pre-1987 common law, "gross negligence" means "such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it."[103] As a result of a significant two-word modification achieved by inserting "actual" before "conscious indifference" and changing "indicate" to "establish," tort reform section 41.001(5) defines "gross negligence" for purposes of exemplary damages to mean "such an entire want of care as to *establish* that the act or omission was the result of *actual* conscious indifference to the rights, safety, or welfare of the person affected."[104]

One purpose of this two-word modification is to strike a fairer balance between litigants on the exemplary damages "playing field" by redefining "gross negligence" somewhere between the "pre" and "post" *Burk Royalty Co. v. Walls*[105] and *Williams v. Steves Industries,*

Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2, 25 HOUS. L. REV. 245, 316-24, 332-34 (1988).

100. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1990); *see also* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 8.05 (2d ed. 1983 & Supp. 1989).

101. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1990).

102. *Id.* § 41.001(5). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2,* 25 HOUS. L. REV. 245, 317-24 (1988).

103. Williams v. Steves Indus., Inc., 699 S.W.2d 570, 572-73 (Tex. 1985); *see also* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981); 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 4.02 (1987); 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 41.13 (1982).

104. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 1990)(emphasis added). The important differences that the two-word modification to section 41.001(5) makes, and the confirming legislative history are discussed in Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2,* 25 HOUS. L. REV. 245, 317-24 (1988).

105. 616 S.W.2d 911 (Tex. 1981); *see also* Montford & Barber, *1987 Texas Tort Reform:*

Inc.[106] common law. Another is to eliminate legislatively "the 'objective' prong of the *Steves Industries* dual test."[107]

(iv) Burden Of Proof Cannot Be Satisfied By Ordinary Negligence Or Shifted To Defendant[108]

This provision goes hand in hand with the legislative purpose of tort reform section 41.001(5) to strike a fairer balance in the exemplary/punitive damages aspect of tort-type litigation and to curtail the "objective" trend in the *Burk Royalty* and *Steves Industries* line of cases.[109]

(v) Additional Aspects of Exemplary Damages Tort Reform

Chapter 41 provides that with respect to exemplary damages there is (a) no joint and several liability,[110] (b) no prejudgment interest,[111] (c) no recovery if only nominal damages are awarded,[112] and (d) no recovery if multiple-damages are elective under another statute.[113]

The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2, 25 HOUS. L. REV. 245, 317-23 (1988).

106. 699 S.W.2d 570 (Tex. 1985).

107. Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 323-24 (1988).

108. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 333 (1988).

109. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (Vernon Supp. 1990).

110. *Id.* § 41.005. For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 334-35 (1988).

111. TEX. CIV. PRAC. & REM. CODE ANN. § 41.006 (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 335 (1988).

112. TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(a) (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 334 (1988).

113. TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(b) (Vernon Supp. 1990). For a discussion of this provision of the 1987 tort reform laws, see Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 334 (1988).

D. *Effective and Implementation Dates for Closing the 1987 DTPA-Tort Reform Loophole*

The 1989 DTPA reform amendment was passed by the 71st Legislature on May 29, 1989, and signed by Gov. Bill Clements on June 14, 1989.[114] Its effective date was September 1, 1989, and it applies to claims for which a suit was filed on or after that date.[115] If a DTPA notice required by section 17.50A(a) was delivered or mailed (deposited in the United States mail, postage prepaid) before that effective date, and if a DTPA suit was filed within 120 days after the delivery or mailing date, then the suit is considered filed before the effective date.[116]

E. *Practice Notes*

1. Exemplary/Punitive Damages - Insurability/Insurance

The Texas cases that have addressed whether, as a matter of public policy, liability for exemplary or punitive damages is insurable have ruled in favor of coverage.[117] However, liability insurance policies vary regarding coverage vel non of exemplary or punitive damages.

2. Respondeat Superior Liability for Exemplary/Punitive Damages

Under Texas common law a "principal" is liable for exemplary damages attributable to the conduct of an "agent" only if (a) the principal (at management level for a corporate principal) authorizes, ratifies, or approves the agent's conduct, (b) the agent's conduct was done within the scope of a managerial capacity, or (c) the agent was unfit and recklessly employed by the principal.[118]

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114. TEX. REV. CIV. STAT. ANN. art. 17.50(b)(1)(A) (Vernon Supp. 1990).

115. Act of June 14, 1989, ch. 380, § 6(a), 1989 Tex. Sess. Law Serv. 1490 (Vernon).

116. *Id.* § 6(c).

117. Ridgway v. Gulf Life Ins. Co., 578 F.2d 1026, 1029 (5th Cir. 1978)(applying Texas law); Home Indem. Co. v. Tyler, 522 S.W.2d 594, 596-97 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342-43 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.); *see also* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 340 nn.151-52 (1988).

118. King v. McGuff, 149 Tex. 432, 434-35, 234 S.W.2d 403, 405 (1950). *See generally* 28 TEX. JUR. 3d *Damages* §§ 176-177 (1983); Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 340-41 (1988).

3. Preparing a Charge and Judgment Under The New Law

Given that tort reform chapter 33[119] has been brought over and integrated into the tort-type suits covered by the 1989 DTPA reform amendment to DTPA section 17.50(b)(1),[120] the previously published Practice Notes written by the authors of this article relating to preparing a court's charge for submission of a chapter 33 comparative responsibility case and a judgment in that kind of case are now pertinent, in large part, to those DTPA suits.[121] The reader is also referred to the forthcoming DTPA Pattern Jury Charges and Comments to be published by the State Bar of Texas.[122]

SECTION III
The Ongoing Quest for Fairer DTPA Laws: Waiver, Notice, Inspection, Settlement Offers, Insurance

A. *Synopsis of DTPA Reform Laws Regarding Waiver, Notice, Inspection, Settlement Offer, Insurance*

Amending DTPA sections 17.42 and 17.505,[123] the 1989 DTPA reform amendments include provisions that:[124]

(1) add a new and distinct waiver concept which enables a consumer who is represented by legal counsel in seeking or acquiring goods or services (other than a family residence) by purchase or lease for more than $500,000 to waive the DTPA (except the DTPA indemnity/contribution provision) in a written contract signed by the consumer and his legal counsel;[125]

(2) increase from 30 to 60 days the time for giving the required pre-suit DTPA notice;[126] and likewise the time for giving a post-suit (in lieu of pre-suit) DTPA notice for a DTPA counterclaim or when there is an expiring statute of limitations;[127]

(3) require the pre-suit DTPA notice to set forth in reasonable

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119. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.016 (Vernon 1987).

120. TEX. REV. CIV. STAT. ANN. art. 17.50(b)(1)(A) (Vernon Supp. 1990).

121. *See* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 298-307 (1988).

122. Charges 106.01-23, which were to be published after this article, will be in 4 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC.

123. TEX. BUS. & COM. CODE ANN. §§ 17.42, 17.505 (Vernon Supp. 1990).

124. *Id.*

125. *Id.* § 17.42.

126. *Id.* § 17.505(a).

127. TEX. BUS. & COM. CODE ANN. § 17.505(b) (Vernon Supp. 1990).

detail the "consumer's specific complaint and the amount of actual damages and expenses";[128]

(4) add a right, upon written request made within the 60-day presuit notice period, to reasonably inspect the goods involved in the consumer's claim, with the penalty for unreasonable refusal to permit the inspection being to preclude recovery of the automatically trebled first $1,000 of actual damages;[129]

(5) with respect to a DTPA settlement offer/tender:

(a) increase from 30 to 60 days the time within which the offer must be made to limit recovery to the lesser of the amount offered or actual damages;[130]

(b) clarify that this limitation applies if the offered amount is the same as or more than, or if the court finds it to be substantially the same as, actual damages;[131] and

(c) provide that the offer is not admissible as evidence;[132]

(6) authorize the Attorney General of Texas, under certain circumstances, to file suit against an insurance company without prior approval from the State Board of Insurance.[133]

B. *Background of DTPA Reform Other Than Closing the 1987 DTPA/Tort Reform Loophole And Relating to Residential Construction*

Much more DTPA reform was sought than secured from the 71st Legislature.[134] During 1988 the Joint Committee on Deceptive Trade

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128. *Id.* § 17.505(a).

129. *Id.*

130. *Id.* § 17.505(c)-(d).

131. *Id.* § 17.505(d).

132. TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon Supp. 1990).

133. *See infra* notes 178-86 and accompanying text.

134. JOINT COMM. ON DECEPTIVE TRADE PRACTICES, BILL ANALYSIS, Tex. S.B. 437, 71st Leg. (1989)(filed with Senate Finance Committee 71st Legislature). As filed in the 71st Legislature, S.B. 437 would have: (1) exempted from the DTPA "claims arising out of professional services the essence of which is the exercise of professional judgment"; (2) limited DTPA liability for breaches of warranty, Insurance Code violations, and unconscionable conduct to those committed knowingly; (3) redefined " 'consumer' to mean those who claim not more than $250,000 in damages under the DTPA"; (4) increased "the maximum amount that can be recovered by the consumer under the automatic DTPA treble damages provision from $3,000 to $7,500"; (5) increased the maximum amounts that the Attorney General "can recover as civil penalties from $2,000 per DTPA violation to $10,000 and from $10,000 cumulatively for such violations to $100,000; and for each violation of a DTPA injunction from $10,000 to $50,000 and from $50,000 cumulatively for such violations to $1,000,000"; (6) per-

Practices,[135] and during 1989 the Senate Jurisprudence Committee and the House State Affairs Committee heard a lot of testimony addressing a wide range of potential DTPA reforms.[136] But, when

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mitted "recovery under the DTPA of noneconomic damages like mental anguish ("soft" damages) only for DTPA violations that are committed knowingly"; (7) included "in the computation of the maximum discretionary DTPA treble damages award only those actual damages that are not of the noneconomic, incidental, or consequential type"; (8) limited "to $1,000,000 the total amount that a consumer may recover from a defendant under the DTPA"; (9) modified "procedural aspects of the DTPA" relating to "statute of limitations, receivership, cumulative remedies," and liberal construction; and (10) defined " 'knowlingly,' as applied to breaches of warranty, Insurance Code violations, and unconscionable actions for DTPA purposes, to mean actual awareness not merely of the conduct involved but also that it constituted a breach of warranty, Insurance Code violation, or unconscionable action." *Id.*; *see also The Texas Deceptive Trade Practices-Consumer Protection Act: Hearings on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 1-3 (Mar. 22, 1989)(transcript of tape 1 is available from Senate Staff Services).

135. *See supra* Section II, note 46 and accompanying text.

136. The agenda of DTPA issues adopted in 1988 by the Joint Committee on Deceptive Trade Practices included:

2. *NOTICE.* Should the "offer of settlement" provision be expanded in its scope? Should DTPA class action suits brought in state court conform to the same rules followed by the federal courts, which would leave it up to the judge to decide whether individual notice should be required to members of the plaintiff class? In other words, do away insofar as DTPA class action is concerned, with the notice requirement under [Rule 42 of the Texas Rules of Civil Procedure].

3. *TREBLING PROVISION.* Should there be limits to the size of the claim subject to the trebling provision? Should the threshold for unknowing violations subject to the automatic trebling provision (i.e., $1,000) be raised? Should consideration be given to amending the DTPA to mandate treble damages for all knowing violations and to remove any penalty (except actual damages) for unknowing violations? Should additional damages for "knowing" violations be limited to "known at the time of conduct?" Should automatic treble damages be limited to "intentional" violations, as distinguished from "knowing violations?" Should the DTPA apply at all to insurance transactions/ occurrences covered by the Insurance Code?

4. *APPLICABILITY OF THE DTPA TO BUSINESS CONSUMERS.* Should the applicability of the DTPA to business consumers be expanded or contracted? Should some type of contractual waiver from DTPA applicability be permitted for more business consumers than just those with $25,000,000 in assets?

5. *APPLICABILITY OF THE DTPA TO FINANCIAL INSTITUTIONS.* To what extent, if any, should the DTPA be clarified or modified regarding its applicability to financial institutions? For example, should securities, money, and/or "pure" loans be considered goods and services and therefore be covered by the DTPA? Or, should financial institutions be further exempted from DTPA liability in situations where a loan is connected with a "good" or another service?

7. *ALTERNATIVE DISPUTE RESOLUTION.* What provisions, if any, should be made for DTPA disputes to be adjudicated through some type of alternative dispute resolutions (ADR) procedure such as arbitration?

8. *MISCELLANEOUS ISSUES.* Should the DTPA be clarified or modified regarding its applicability/inapplicability to remotely involved parties (persons/entities)? Should

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DTPA reform "push-came-to-shove,"[137] the only DTPA reforms that were politically achievable during 1989, other than closing the DTPA loophole in the 1987 tort reform law[138] and rebalancing the interests of homebuyers and homebuilders relative to construction defects,[139] were those concerning waiver,[140] notice,[141] inspection,[142] settlement offer,[143] and insurance.[144]

C. *DTPA Reform Regarding Transactional Waiver: Text and Commentary*

1. Text of Section 17.42(a)[145]

Section 17.42(a) was amended to permit waiver of DTPA application under specific circumstances. Section 17.42(a) now provides:

> *(a)* Any waiver by a consumer of the provisions of this subchapter[146] is contrary to public policy and is unenforceable and void; *provided, however, that a waiver is valid and enforceable if a defendant in an action or claim under this subchapter pleads and proves:*

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there be a DTPA privity requirement? Should the presently expanding DTPA doctrine of "inextricably intertwined" be eliminated/limited/clarified/modified? Should the limited exemption from the DTPA for health care providers be eliminated? Should the definition of "consumer" in the present DTPA be otherwise modified?

See supra Section II, notes 46-47 and accompanying text.

137. Pro-DTPA reformers included the Texas Civil Justice League, Texas Association of Defense Counsel, and Texas Lawyers Insurance Exchange. *See supra* Section II, note 49 and accompanying text; *see also supra* Section II, note 54 and accompanying text. Those opposing DTPA reform in general included the Texas Consumer Association, Public Citizen of Texas, the Consumer Protection Division of the Attorney General's Office, and the attorneys David F. Bragg, Phillip K. Maxwell and Joe K. Longley, who wrote TEXAS CONSUMER LITIGATION, and attorney/teacher Michael Curry, who assists in supplements to TEXAS CONSUMER LITIGATION. JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg. 45-48, 52-54, 98-101, 127-34 (1989)

138. *See supra* Section II.

139. *See infra* Section IV.

140. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1990); *see also infra* notes 148-164 and accompanying text.

141. TEX. BUS. & COM. CODE ANN. § 17.505(a)-(b) (Vernon Supp. 1990); *see also supra* notes 4-6 and accompanying text.

142. TEX. BUS. & COM. CODE ANN. § 17.505(a)-(b) (Vernon Supp. 1990).

143. *Id.* § 17.505(c)-(d); *see also supra* notes 131-133 and accompanying text; *infra* note 171-177 and accompanying text.

144. *See supra* note 134 and accompanying text; *see also infra* notes 178-209 and accompanying text.

145. TEX. BUS. & COM. CODE ANN. § 17.42(a) (Vernon Supp. 1990). The italicized portion of this text of DTPA section 17.42(a) is the part added by the 1989 DTPA reform amendment. *Id.*

146. *Id.* §§ 17.42, 17.505.

(1) the consumer is not in a significantly disparate bargaining position;
(2) the consumer is represented by legal counsel in seeking or acquiring goods or services, other than the purchase or lease of a family residence occupied or to be occupied as the consumer's residence, by a purchase or a lease for a consideration paid or to be paid that exceeds $500,000; and
(3) the consumer waives all or part of this subchapter, other than Section 17.555, by an express provision in a written contract signed by both the consumer and the consumer's legal counsel; . . .[147]

For consumers in major purchase or lease transactions who do not want the enhanced rights and remedies provided by the DTPA, apply to the transaction,[148] the 1989 DTPA to reform amendment adds a new waiver concept—a transactional oriented waiver. Previously, the only DTPA waiver available was restricted to consumers who had at least $5 million in assets and were knowledgeable, experienced, and not in a disparate bargaining position.[149]

a. "Not in a Significantly Disparate Bargaining Position"

Borrowed from the 1983 waiver provision for consumers with $5 million or more in assets,[150] the purpose of this qualification is essentially the same as the common law policy against contracts of "adhesion."[151] As the Texas Supreme Court stated in *Allright, Inc. v. Elledge*:[152]

In determining whether a contractual agreement limiting liability is

147. *Id.* § 17.42(a)(3).

148. JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg. 76-88 (1989).

149. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987). The 1983 DTPA amendment provides that the Act (other than its section 17.555 indemnity/contribution provision) may be waived by a consumer who (a) has at least $5 million in assets, (b) is not in a significant bargaining position, and (c) has knowledge and experience in financial and business matters that enables the consumer to evaluate a transaction's merits and risks. *Id.* The 1983 DTPA amendment also excludes from the definition of "consumer" anyone with at least $25 million in assets. *Id.* § 17.45(4).

150. *Id.* § 17.42; *see also The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 10-11 (Mar. 29, 1989)(transcript of tape 1 available from Senate Staff Services).

151. *The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 10-11 (Mar. 29, 1989)(transcript available from Senate Staff Services).

152. 515 S.W.2d 266, 268 (Tex. 1974)(limitation on parking lot owner's liability for theft loss in monthly written agreement signed by car owner held not to be void in absence of circumstance depriving the car owner of freedom of choice).

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against public policy we look to the relationship between the parties. If because of this relationship there exists a disparity of bargaining power, the agreement will not be enforced . . . . *A disparity of bargaining power exists when one party has no real choice in accepting an agreement limiting the liability of the other party* . . . ."[153]

In citing and distinguishing *Crowell v. Dallas Housing Authority*,[154] the Texas Supreme Court explained:

> The basis given by the court and writers for reaching this result [nullifying attempts by owners of parking lots and parcel check rooms] is that the indispensable need for these services deprives the customer of any real bargaining power . . . .[155]

A shorthand rendition of this concept is set forth in *Melody Home Manufacturing Co. v. Barnes*,[156] where adhesion contracts are referred to as "standardized contract forms offered to consumers of goods and services on an essentially 'take it or leave it' basis which limit the duties and liabilities of the stronger party . . . ."[157]

Under these cases, the key to bargaining disparity is whether the disadvantaged contracting party had "no real choice" but "to take it or leave it." The same should hold true for purposes of the new DTPA section 17.42(a)(1)-(3).[158] To not be in a "significantly disparate bargaining position," and, therefore, to be able to negotiate a waiver provision, the contracting consumer should have a "real choice" other than to "take" or "leave" a contract containing a DTPA waiver provision. When the consumer has a "real choice," a DTPA waiver can appropriately be considered a bargained for item.

Hypothetical #1. A retailer who is represented by an attorney ne-

153. *Id.* at 267 (emphasis added).

154. 495 S.W.2d 887, 889 (Tex. 1973)(liability limitation in written rental agreement between public housing authority and low income tenant held to be contrary to public policy). In *Allright* this was said to be a "classic example" of disparity of bargaining power in that the low income tenant had "no real choice" but to accept the limitation in order to secure the housing. *See Allright*, 515 S.W.2d at 267.

155. *Id.* at 268.

156. 741 S.W.2d 349, 353 (Tex. 1987)("implied warranty that repair or modification of existing tangible goods or property," e.g., mobile home, may not be waived or disclaimed).

157. *Id.* at 355.

158. Smith v. Texas Co., 53 S.W.2d 774, 776-77 (Tex. Com. App. 1932, holding approved). Under the rules of statutory construction, it is presumed that the legislature uses words that have been construed by the courts, and intend them to have, their settled judicial meaning. *Id.*; *see also* Parr v. Tagco Indus., 620 S.W.2d 200, 205-06 (Tex. Civ. App.—Amarillo 1981, no writ)(legislature uses words in settled judicial sense).

gotiates with competitive vendors A and B to purchase a large quantity of a generic product. During the bargaining process both vendors reduce their price to $10 million, but only vendor A agrees to a further reduction to $9.95 million, which vendor A conditions on the retailer agreeing to waive all DTPA provisions (other than section 17.555 relating to indemnity and contribution). Since the retailer has a choice to buy the same quantity of an equivalent product from either vendor A or B for the same price without any DTPA waiver, the retailer is not in a significantly disparate bargaining position relative to vendor A, so that section 17.42(a)(1) is satisfied, and the waiver provision is valid and enforceable if the other prerequisites of section 17.42(a)(2)-(3) are also met. In the opinion of the authors of this article, under these facts and circumstances the "not in a significantly disparate bargaining position" prerequisite of section 17.42(a)(1) is satisfied as a matter of law, and a fact finding is not needed. This is so regardless of the retailer and vendor's respective financial positions.

Hypothetical #2. Suppose in hypothetical #1 there is only one vendor from whom the product can be purchased. In this circumstance the retailer has "no real choice" other than to buy or not—to take it or leave it—from this vendor. Depending on additional facts and circumstances (e.g., such as whether or not the product is essential to the retailer's business), the retailer may be in a "significantly disparate bargaining position," and thereby not be permitted to waive any DTPA provision, even though the other prerequisites of section 17.42(a)(2)-(3) are met.

b. Representation by Legal Counsel in Purchasing or Leasing a Service or Good (Other Than a Home) for More Than $500,000

The transactional prerequisites outlined in new DTPA section 17.42(a)(2) require that (1) the consumer is represented by legal counsel, (2) in seeking or acquiring a good or service (other than the purchase or lease of a family residence occupied or to be occupied as the consumer's residence), and (3) by a purchase or a lease for a consideration to be paid that exceeds $500,000. These prerequisites differentiate between a transaction that is large enough (i.e., exceeds $500,000) and involves a consumer who is sufficiently informed by virtue of representation by a lawyer in seeking or acquiring a nonresidential good or service so that the consumer does not need the

enhanced rights and remedies provided by the DTPA for other transactions.

Hypothetical #3. In a hypothetical #1 situation, there are two retailers instead of one. Retailer A is represented by a lawyer, but retailer B is not. Retailer A's transaction may include a DTPA waiver provision but retailer B's may not.

Hypothetical #4. In a hypothetical #1 situation, the negotiated price is $100,000 (or $99,500) instead of $10 million (or $9.95 million). This transaction is too small to qualify for DTPA waiver because it does not exceed $500,000 consideration.

Hypothetical #5. A consumer homebuyer is represented by an attorney in purchasing a $1 million home for the consumer's own use. The homebuilder has several comparable houses from which the consumer may choose. However, since the transaction involves a home to be occupied by the consumer, the waiver enabling provisions are not fulfilled.

c. Waiver of DTPA Provisions (Other Then the Contribution/Indemnity Provision) in a Written Contract

To assure that a consumer who is considering waiving all or part of the DTPA is adequately informed about the enhanced DTPA rights and remedies he would be waiving, section 17.42(a)(3) requires that the consumer and his lawyer sign a written contract containing the DTPA waiver. This concept is analogous to a statutory requirement of signature of counsel for both parties to enforce arbitration agreements.[159]

Hypothetical #6. In a hypothetical #3 situation, retailers A and B are each represented by an attorney. Retailer A's transaction with vendor A is consummated by a written contract signed by both he and his attorney. Retailer B's transaction, however, is accomplished through a printed form contract signed by retailer B but not his lawyer. The DTPA waiver in retailer A's contract is valid if the other prerequisites of section 17.42(a)(1)-(2) are met, but a DTPA waiver in retailer B's contract is invalid.

159. TEX. REV. CIV. STAT. ANN. art. 224 (Vernon 1987).

d. Pleading and Proving a Valid Section 17.42(a)(1)-(3) Waiver

Section 17.42(a) expressly places upon the DTPA defendant asserting a transactional oriented waiver the burden of pleading and proving that the facts and circumstances of the particular contract and waiver satisfy the prerequisites of subsections (1), (2), and (3).[160] In this sense the validity and enforceability of a section 17.42(a)(1)-(3) waiver is an affirmative defense.[161]

2. Text of Section 17.42(b)

Section 17.42(b) provides:

> The existence or absence of a disparate bargaining position may not be established as a matter of law solely by evidence of the consumer's financial position relative to other parties to the contract or by matters contained in a written contract relating to the relative bargaining position of the parties.[162]

This provision relates to section 17.42(a)(1),[163] under which the key to the existence or absence of a "disparate bargaining position" is whether the contracting consumer had "no real choice" except a "take it or leave it" transaction embodying a DTPA waiver provision. This provision does not prevent the presence or absence of a bargaining disparity from ever being established as a matter of law. Rather it rules out so establishing this matter "solely" by evidence of the parties' relative financial position or by matters contained in the parties' written contract regarding their relative bargaining position. Under section 17.42(b) parties cannot stipulate away a true bargaining disparity, and financial comparisons are not necessarily controlling. Conversely, contractual recitals relating to the parties' relative bargaining position and/or evidence of their relative financial position, when combined with other pertinent evidence, may together establish as a matter of law, under appropriate facts and circumstances, either the existence or absence of a bargaining disparity.

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160. Federated Dep't Stores, Inc. v. Houston Lighting & Power Co., 646 S.W.2d 509, 512 (Tex. App.—Houston [1st Dist.] 1982, no writ). According to case law, the burden is on the party claiming a disparity of bargaining position to present evidence raising a fact issue with respect to that claim, unless the position of one of the parties in and of itself is such evidence. *Id.*

161. *See* TEX. R. CIV. P. 94 (rule lists "waiver" as affirmative defense).

162. TEX. BUS. & COM. CODE ANN. § 17.42(b) (Vernon Supp. 1990).

163. *See supra* notes 151-58 and accompanying text.

Hypothetical #7. In a hypothetical #1 situation, the retailer has $1 million in assets and vendor A has $100 million in assets. Under subsection 17.42(b) this financial difference does not establish as a matter of law that the retailer has a significantly disparate bargaining position relative to vendor A. Indeed, the other uncontroverted facts and circumstances hypothesized in #1 may establish as a matter of law the absence of such disparity. The $1 million versus $100 million asset difference alone does not determine whether the retailer had a real choice other than a "take it or leave it" contract transaction with a DTPA waiver provision.

Hypothetical #8. In the hypotheticals #1 and #7 situations, the retailer and vendor A insert in their written contract recitals to the effect (a) that the retailer could buy a generically equivalent product from a competitor for the same (or substantially the same) price; and (b) that vendor A is willing to reduce its selling price by a specified amount if the retailer agrees to waive the DTPA (other than the section 17.555 indemnity/contribution provision). The end result of combining these recitals with the undisputed facts set forth in hypotheticals #1 and #7 should be to establish, as a matter of law, the absence of a significantly disparate bargaining position, and the validity and enforceability of the DTPA waiver provision in the contract between the retailer and vendor A.

D. *DTPA Reform Regarding Miscellaneous Revisions to Section 17.505: Text and Commentary*

1. Text of Section 17.505(a)

Section 17.505(a) provides:

> As a prerequisite to filing a suit seeking damages under Subdivision (1) of Subsection (b) of Section 17.50 of this subchapter against any person, a consumer shall give a written notice to the person at least *60* days before filing the suit advising the person in reasonable detail of the consumer's specific complaint and the amount of actual damages and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant . . . .[164]

164. TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon Supp. 1990). The italicized numbers in this text of DTPA section 17.505(a) are the parts of this section that are revised and added by the 1989 DTPA reform amendment. *Id.*

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a. 60-Day Presuit Notice

The time required under section 17.505(a) for giving presuit DTPA notice is increased from 30 to 60 days by the 1989 DTPA reform amendment. The legislative purpose of the 30 days was, and of the 60 days, is to give the recipient of the DTPA notice sufficient time to investigate and evaluate the consumer's DTPA claim, and to determine whether to make a DTPA settlement offer/tender and, if so, the amount and terms of the offer.[165] The public policy underlying this amendment is fairness and encouraging pre-suit settlements of DTPA claims.[166]

b. Notice "In Reasonable Detail"

Adding "in reasonable detail" as a requirement for the content of a pre-suit DTPA notice regarding the consumer's "specific complaint and the amount of actual damages and expenses" is a modification, not codification, of pre-1989 DTPA law. Cases construing and applying the pre-1989 notice requirement in section 17.505 had required very little detail with respect to the consumer's specific complaint and the amount of the consumer's actual damages.[167]

Given the now 60-day period, the recipient of a pre-suit DTPA notice must determine whether to make a pre-suit DTPA settlement offer/tender and, if so, for what amount and upon what terms. The quantum and quality of "detail" in the consumer's DTPA notice can enhance or diminish the prospect of a pre-suit settlement. The 1989

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165. *See The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 7lst Leg. 22 (Mar. 22, 1989)(transcript of tape 1 is available from Senate Staff Services); *see also The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 7lst Leg. 4 (Mar. 29, 1989)(transcript of tape 1 is available from Senate Staff Services); Jim Walters Homes, Inc. v. Valencia, 690 S.W.2d 239, 242 (Tex. 1985)(discussing notice requirements of DTPA).

166. *The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 22 (Mar. 22, 1989)(transcript of tape 1 is available from senate staff services).

167. Jim Walters Homes, Inc. v. Valencia, 690 S.W.2d 239, 242 (Tex. 1985); *see also* Minor v. Aland, 775 S.W.2d 744, 745-46 (Tex. App.—Dallas 1989, motion pending); McCann v. Brown, 725 S.W.2d 822, 825 (Tex. App.—Fort Worth 1987, no writ); Village Mobile Homes v. Porter, 716 S.W.2d 543, 547 (Tex. App.—Austin 1986, writ ref'd n.r.e.); North Am. Van Lines of Tex., Inc. v. Bauerle, 678 S.W.2d 229, 235-36 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

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amendment to section 17.505(a) sets the level of detail required at a "reasonable detail" level.

2. Text of Section 17.505(a) [continued]

The remainder of section 17.505(a) expressly establishes the right of a recipient of a DTPA pre-suit notice to inspect goods involved in a consumer's complaint with the following provision:

During the 60-day period a written request to inspect, in a reasonable manner and at a reasonable time and place, the goods that are the subject of the consumer's action or claim may be presented to the consumer. If the consumer unreasonably refuses to permit the inspection, the court shall not award the two times actual damages not exceeding $1,000, as provided in Subsection (b) of Section 17.50 of this subchapter.[168]

This new DTPA provision gives the recipient of a DTPA presuit notice a right, upon written request presented to the consumer within the presuit 60-day DTPA notice period, to inspect the goods involved in the consumer's complaint. The inspection is to be done in a reasonable manner and at a reasonable time and place.

The legislative purposes underlying the right of inspection are fairness and facilitation of presuit DTPA settlements.[169] Without such inspection as a matter of right, the recipient of a DTPA notice has, when the consumer and/or his lawyer are uncooperative, no presuit access to the goods that are the subject of the consumer's claim. In some instances this can deter presuit settlements that might otherwise be made.

It is to be noted that an additional inspection right with respect to asserted residential construction defects is contained in a companion 1989 DTPA reform law enacted as a new chapter 27 to the Property Code.[170]

To deter unreasonable refusals of this inspection right, section 17.505(a) penalizes a consumer who so refuses by prohibiting recovery by the consumer of the automatic DTPA "treble" damage pursu-

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168. TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon Supp. 1990).

169. *See The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 8, 14-15 (Mar. 29, 1989)(transcript of tape 1 is available from Senate Staff Services); *see also The Texas Deceptive Trade Practices-Consumer Protection Act: Hearing on Tex. S.B. 437 Before the Senate Jurisprudence Comm.*, 71st Leg. 1-3 (Mar. 22, 1989)(transcript of tape 1 is available from Senate Staff Services).

170. TEX. PROP. CODE ANN. §§ 27.004(a), 27.004(a)(1) (Vernon Supp. 1990).

https://commons.stmarytx.edu/thestmaryslawjournal/vol21/iss3/1

ant to section 17.50(b)(1) (i.e., two times actual damages not exceeding $1,000).

Hypothetical #9. A consumer with a malfunctioning appliance gives a presuit 60-day DTPA notice to the dealer from whom it was purchased. Within a few days after receiving the notice the dealer sends the consumer a letter asking to inspect the appliance in the consumer's home on a day and at a time convenient to the consumer, and stating that the inspection would be done by a qualified manufacturer representative and dealer representative. Without any explanation the consumer refuses to permit the inspection and does not offer any alternative. At trial the jury finds for the consumer as to DTPA violation, "knowingly" committed, producing cause, $2,500 actual damages, and $5,000 "additional" damages. The jury also finds that the consumer unreasonably refused to permit the inspection. The consumer can recover the $2,500 actual damages and $5,000 "additional" damages but not the $2,000 (i.e., two times $1,000) that would otherwise be automatically awarded pursuant to section 17.50(b)(1).

3. Text of Section 17.505(b)

Section 17.505(b) provides:

> If the giving of *60* days' written notice[171] is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations, or if the consumer's claim is asserted by way of counterclaim, the notice provided for in subsection (a) of this section is not required. However, the tender provided for by subsection (c) of this section and by subsection (d) of section 17.50 of this subchapter may be made within *60*[172] days after the filing of the suit or counterclaim.[173]

The increase from 30 to 60 days in this section relating to postsuit DTPA notices corresponds to the time increase for presuit DTPA notices.[174]

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171. TEX. BUS. & COM. CODE ANN. § 17.50(b) (Vernon Supp. 1990).

172. *Id.*

173. TEX. BUS. & COM. CODE ANN. § 17.505(b) (Vernon Supp. 1990)(italicized numbers in text of DTPA section 17.505(b) are revisions to this section in 1989 DTPA reform amendments).

174. *See supra* notes 164-66 and accompanying text.

4. Text of Section 17.505(c)

The provisions of section 17.505(c) govern settlement and state:

> Any person who receives the written notice provided by Subsection (a) of this section may, within *60* [175] days after the receipt of the notice, tender to the consumer a written offer of settlement, including an agreement to reimburse the consumer for the attorneys' fees, if any, reasonably incurred by the consumer in asserting his claim up to the date of the written notice. A person who does not receive such a written notice due to the consumer's suit or counterclaim being filed as provided for by Subsection (b) of this section may, within *60* [176] days after the filing of such suit or counterclaim, tender to the consumer a written offer of settlement, including an agreement to reimburse the consumer for the attorneys' fees, if any, reasonably incurred by the consumer in asserting his claim up to the date the suit or counterclaim was filed. Any offer of settlement not accepted within 30 days of receipt by the consumer shall be deemed to have been rejected by the consumer.[177]

The time requirements for "pre" and "post" suit DTPA notices have been increased from 30 to 60 days. The time within which the DTPA recipient may respond with a written settlement offer for the purposes of section 19.505(c) is likewise increased from 30 to 60 days. This also serves the legislative purposes of fairness and facilitating pre-suit DTPA settlements.[178]

5. Text of Section 17.505(d)

Where a settlement offer has been made and rejected, section 17.505(d) provides:

> A settlement offer made in compliance with subsection (c) of this section, if rejected by the consumer, may be filed with the court together with an affidavit certifying its rejection. If the amount tendered in the settlement offer is the same *as or more than, or if the court finds that amount to be* substantially the same as, the actual damages found by the trier of fact, the consumer may not recover an amount in excess of the amount tendered in the settlement offer or the amount of actual damages found by the trier of fact, whichever is less. *Such settlement offer*

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175. TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon Supp. 1990)(italicized numbers in this text of DTPA section 17.505(c) are revisions to this section in the 1989 DTPA reform amendments).

176. *See supra* notes 164 and 166.

177. TEX. BUS. & COM. CODE ANN. § 17.505(c) (Vernon Supp. 1990).

178. *See supra* notes 165-69.

shall not be admissible in evidence before a jury.[179]

a. Clarification Regarding "Same" and "Substantially the Same"

The purpose of the italicized revision in the second sentence of section 17.505(d) (i.e., if the amount offered in settlement is "the same as or more than, or if the court finds that amount to be substantially the same as," the amount of actual damages found by the trier of fact) is to clarify that the limitation provided by this section is automatically applicable when the amount offered equals or exceeds the damages found. A trial court finding is necessary only when a determination needs to be made as to "substantially the same."

b. Inadmissibility of Settlement Offer

The meaning and purpose of the italicized sentence added at the end of section 17.505(d) is self-explanatory.

E. *DTPA Reform Regarding Insurance—Attorney General's Authority to Sue*

The insurance reform legislation (hereinafter Senate Bill 255) passed during the 71st Legislature amended section 17.47 of the Business and Commerce Code and[180]

(1) permits the consumer protection division to bring a DTPA action against a licensed insurer or insurance agent if, after written notice from the division, the State Board of Insurance does not return a written objection within 25 days after the date the commissioner receives written notice of the intent to bring the action.[181]

(2) prohibits the consumer protection division from filing a DTPA action against an insurer or licensed insurance agent only if, within 25 days from the date of the division's written notice of intent to file such an action, the commissioner files a written objection with the division based on one or more of the following:[182]

(a) investigation by the State Board of Insurance is in

179. TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon Supp. 1990)(italicized words in this text of § 17.505(d) are revisions to this section in 1989 DTPA reform amendments).

180. Act of June 16, 1989, ch. 1082, §§ 8.01-.03, 1989 Tex. Sess. Law Serv. 4370, 4407-08 (Vernon).

181. TEX. BUS. & COM. CODE ANN. § 17.47(a) (Vernon Supp. 1990).

182. *Id.*

progress;[183]

(b) the State Board of Insurance or its commissioner has "directed the commencement of an investigation, disciplinary proceeding or other action against a party";[184]

(c) the company or agent, the subject of the proposed action, is "involved in a supervision, conservatorship, or delinquency proceeding";[185]

(d) "[T]he identity of the party or matter that is the subject of the proposed action has been made confidential by law";[186]

(e) the State Board of Insurance or the commissioner, after investigation, has determined that neither article 21.21 of the Insurance Code or other insurance laws or rules and regulations have been violated;[187]

(3) permits the consumer protection division to challenge the validity of an objection of the State Board of Insurance to the division's proposed action by petition to a district court in Travis County.[188]

1. Background

During the hearings of the Joint Select Committee on Deceptive Trade Practices, testimony from a staff attorney from the consumer protection division of the attorney general's office raised concerns that the State Board of Insurance was not responding to complaints concerning possible false, misleading and deceptive acts on behalf of insurance companies and insurance agents in Texas.[189] Under previous versions of the DTPA, the Texas Attorney General could not initiate a DTPA action against an insurer unless the Texas Insurance Commissioner or State Board of Insurance referred the case to the consumer protection division.[190] There was considerable debate during the 71st Legislative Session about whether the attorney general's office, normally a highly visible and often politically oriented office, should be given concurrent jurisdiction with the State Board of Insur-

183. *Id.* § 17.47(a)(1).
184. *Id.* § 17.47(a)(2).
185. TEX. BUS. & COM. CODE ANN. § 17.47(a)(3) (Vernon Supp. 1990).
186. *Id.* § 17.47(a)(4).
187. *Id.* § 17.47(a)(5).
188. *Id.* § 17.47(a).
189. REP. OF THE JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg. 52-54, 938-47 (1989).
190. TEX. BUS. & COM. CODE ANN. § 17.47(a) (Vernon Supp. 1990).

ance in pursuing false, misleading, and deceptive acts or practices in the insurance industry.

The original version of Senate Bill 437, dealing with amendments to the DTPA, contained provisions which permitted the consumer protection division to pursue an action directly against an insurer without requiring a referral from the State Board of Insurance.[191] These provisions, however, were dropped from the DTPA reform bill after amendments to Senate Bill 255 added provisions allowing the attorney general to pursue a cause of action against an insurer without a referral from the State Board of Insurance.[192]

The DTPA amendment to the insurance reform act was the final insurance reform issue to be resolved by the House and Senate Conference Committee. The resulting legislation was a compromise which most of those involved in both the insurance reform and the DTPA reform efforts believed was a meaningful solution to a strenuously debated issue.

2. Text of Section 17.47

Section 17.47 was amended and provides as follows:

> (a) Whenever the consumer protection division has reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter, and that proceedings would be in the public interest, the division may bring an action in the name of the state against the person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such method, act, or practice. The consumer protection division may bring any action under this section against a licensed insurer or insurance agent for a violation of this subchapter, Article 21.21, Texas Insurance Code, as amended, or the rules and regulations of the State Board of Insurance issued under Article 21.21, Texas Insurance Code, as amended, only *if* [~~on the written request of~~] the State Board of Insurance or the commissioner of insurance, *acting on behalf of the State Board of Insurance, does not within 25 days after the date the commissioner of insurance receives written notice from the consumer protection division of its intent to bring that action file with the consumer protection division a written objection to the action stating one or more of the following reasons for that objection:*

191. The original S.B. 437 is on file with the Senate Committee on Jurisprudence and is available from the authors of this article.

192. S.J. OF TEX., 71st Leg., Reg. Sess. 843-44 (1989).

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(1) an investigation under the direction of the State Board of Insurance or the commissioner of insurance is in progress at the time the written objections are filed relating to a party or matter that is the subject of the proposed action;

(2) the State Board of Insurance or the commissioner of insurance has directed the commencement of an investigation, disciplinary proceeding, or other action against a party or matter that is the subject of the proposed action;

(3) the party or matter that is the subject of the proposed action is involved in a supervision, conservatorship, or delinquency proceeding;

(4) the identity of the party or matter that is the subject of the proposed action has been made confidential by law or by determination of the commissioner of insurance; or

(5) after investigation, the State Board of Insurance or the commissioner of insurance has made a determination that no violation of Article 21.21, Insurance Code, or other insurance laws of this state or rules or regulations promulgated under that article or those laws has occurred. If the commissioner of insurance has determined that the information that forms the basis for the written objection is confidential under Article 21.28A, Insurance Code, the written objection shall state that the information is confidential, and the written objection may not be disclosed by the consumer protection division without written consent of the commissioner of insurance. Not later than the 10th day after the date on which the period of confidentiality ends, the commissioner of insurance shall forward written notice to the consumer protection division that confidentiality has ended.

On timely filing of written objections stating one or more of the reasons in Subdivisions (1) through (5) of this subsection, the consumer protection division may not bring an action against a licensed insurer or licensed agent for violation of this subchapter, Article 21.21, Insurance Code, or rules and regulations of the State Board of Insurance promulgated under Article 21.21, Insurance Code, unless the consumer protection division petitions a district court in Travis County for a determination of the validity of those reasons stated in the written objection and obtains an order from that court stating that the reason or reasons for objection stated in the written objection are not valid.[193]

193. TEX. BUS. & COM. CODE ANN. § 17.47 (Vernon Supp. 1990). *Contra* TEX. BUS. & COM. CODE ANN. § 17.47 (Vernon 1987)("the consumer protection division may bring any action under this section against a licensed insurer or insurance agent . . . only on the written request of the State Board of Insurance or the commissioner of insurance").

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3. Authority to Sue

Before the 1989 amendments, the consumer protection division of the attorney general's office did not have authority under the DTPA to bring an action against an insurance company or insurance agent for violations of the DTPA unless the State Board of Insurance or the insurance commissioner expressly requested the division to pursue such an action. Following the effective date of these amendments,[194] the division will be empowered to initiate action based upon its own investigation and initiative, subject only to a limited veto power granted to the State Board of Insurance or the insurance commissioner.[195]

As a prerequisite to filing suit under section 17.47 of the DTPA, the division will be required to first notify the State Board of Insurance or the commissioner of its intent to file suit. The notice must be in writing; however, there is no express requirement for the written notice to include a reasonably detailed description of the complaint.[196] The better and most efficient practice calls for a written notice with sufficient detail to enable the State Board of Insurance or the commissioner to determine if the agency is concurrently conducting an investigation or has instituted proceedings in connection with a same or similar complaint against the insurance company or agent. If the State Board of Insurance or the commissioner do not object within 25 days from that agency's receipt of written notice, then the consumer protection division may proceed under section 17.47.[197]

4. Veto Power of the State Board of Insurance

The 1989 amendments enable the State Board of Insurance to veto

194. The effective date of these amendments is January 1, 1991. Act of June 16, 1989, ch. 1082, 1989 Tex. Sess. Law Serv. 4370, 4410 (Vernon).

195. This achieves a balance by allowing the consumer protection division to initiate, without referral from the State Board of Insurance, actions against insurance companies and agents while preserving, in the State Board of Insurance, a prerogative for orderly and consistence regulation of insurance companies.

196. The amendments provide only that the consumer protection division submit written notice of its intent to bring an action under section 17.47. TEX. BUS. & COM. CODE ANN. § 17.47(a) (Vernon Supp. 1990).

197. If there is no objection, the consumer protection division has no further notice obligation to the State Board of Insurance. However, better administrative practice calls for a close communication and cooperation between the consumer protection division and the appropriate authorities at the State Board of Insurance to ensure nonduplication of regulatory activities.

a proposal of the consumer protection division to sue an insurer or insurance agent, but only if the board is or will be pursuing the matter through investigation or if other regulatory processes for which the board has original jurisdiction are in effect.[198] However, the State Board of Insurance must act affirmatively upon a written notice from the division by objecting to the division's proposed action within 25 days from its receipt of the notice.[199]

If any investigation, regardless of whether it is related to the basis of the proposed action, is ongoing at the time of the written notice, the State Board of Insurance may veto the division's proposed action.[200] The purpose of this provision is to avoid administrative duplicity and possible interference with the board in carrying out its primary duty of regulating insurance companies. If the insurance company is under supervision,[201] conservatorship[202] or any "delinquency proceeding,"[203] the State Board of Insurance may exercise its veto power.[204]

The board may also object if the identity of the party or the subject matter of the proposed action is confidential due to existing law or a determination of the insurance commissioner.[205] If the board objects on the confidentiality ground, it must notify the division of its objection and instruct that the objection may not be disclosed by the division without written consent of the commissioner.[206] Once confidentiality ends or expires, the commissioner must forward the expiration notice to the division within ten days.[207]

The State Board of Insurance or the commissioner may also object if, after its own investigation, it is determined that the basis for the cause of action proposed by the division does not violate article 21.21

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198. *See infra* notes 200-08 and accompanying text.

199. TEX. BUS. & COM. CODE ANN. § 17.47(a) (Vernon Supp. 1990).

200. *Id.* § 17.47(a)(1).

201. TEX. INS. CODE ANN. art. 21.28A (Vernon 1981 & Supp. 1990).

202. *Id.*

203. *Id.* art. 5.06-1.

204. TEX. BUS. & COM. CODE ANN. § 17.47(a) (Vernon Supp. 1990).

205. *Id.*; *see also* TEX. INS. CODE ANN. art. 21.28A § 3A (Vernon & Supp. 1990). The 1989 insurance reform amendment restricted the time periods during which the State Board of Insurance intervention may be kept confidential. Under the new insurance reforms, confidentiality by the State board of Insurance may last no longer than sixty days and may only occur during periods of supervision under art. 21.28A. Act of June 16, 1989, ch. 1082, 1989 Tex. Sess. L. Serv. 4370, 4385 (Vernon).

206. TEX. BUS. & COM. CODE ANN. § 17.47(a) (Vernon Supp. 1990).

207. *Id.*

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of the Insurance Code or the other insurance laws or rules and regulations promulgated by the board.[208]

5. Determination of Validity of Objections by State Board of Insurance or Commissioner

If the division disputes the validity of an objection by the State Board of Insurance, a petition may be filed with a district court in Travis County, Texas, to determine the objection's validity.[209] The district court is empowered, under this section, only to determine if the objection is valid. The district court cannot allow the division to pursue the action if the objection is valid.[210] If the district court determines that all of the objections of the State Board of Insurance are not valid, the division may proceed under section 17.47.

6. Effective Date of DTPA Insurance Amendments

The effective date of the DTPA insurance amendments is January 1, 1991.[211]

F. *Effective and Implementation Dates for Miscellaneous 1989 DTPA Reforms Other Than DTPA Insurance Amendments*

The effective and implementation dates for the 1989 DTPA reform amendments to section 17.42 (waiver) and section 17.505(a)-(d) (notice, inspection, settlement offer) that are discussed in this Section III[212] are the same as for the 1989 amendment closing the DTPA loophole in the 1987 tort reform laws that is discussed in Section II of this article.[213] These amendments were passed by the 71st Legislature on May 29, 1989, and signed by Gov. Bill Clements on June 14, 1989.[214] The effective date of these DTPA reforms was September 1, 1989, and they apply to claims for which a suit was filed on or after that date.[215] If a DTPA notice required by section 17.505(a) was de-

208. *Id.*
209. *Id.*
210. The language clearly provides that the district court is empowered only to determine if the factual basis for the objection exists. TEX. BUS. & COM. CODE ANN. § 17.47(a) (Vernon Supp. 1990).
211. Act of June 16, 1989, ch. 1082, 1989 Tex. Sess. L. Serv. 4410 (Vernon).
212. *See infra* subsections C and D of this section.
213. *See infra* Section II, subsection D.
214. TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon Supp. 1990).
215. Act of June 14, 1989, ch. 38, § 6, Tex. Sess. Law Serv. 1490-93 (Vernon).

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livered or mailed (deposited in the United States mail, postage prepaid) before that effective date, and if a DTPA suit was filed within 120 days after the delivery or mailing date, then that suit is considered filed before the effective date.[216]

G. *Practice Notes*

In Appendix One is a sample form for including a DTPA waiver in a $500,000-plus written contract for goods or services (other than the consumer's home) that complies with the requirements of DTPA section 17.42(a)(1)-(3).[217] As with most forms, the language and/or content of these sample provisions should be adapted and supplemented to fit the facts and circumstances of the particular contract transaction and related DTPA waiver.[218]

SECTION IV
RESIDENTIAL CONSTRUCTION DEFECTS

A. *Synopsis of Residential Construction Liability Reform*[219]

The new residential construction liability law[220] adds chapter 27 to the Texas Property Code[221] and

(1) applies in all actions, including those under the DTPA,[222] to recover damages arising from residential construction defects, except actions for personal injury, survival or wrongful death, or damage to goods;[223]

(2) provides certain defenses in residential construction cases, including comparative negligence, unreasonable failure to mitigate damages, normal wear and tear, or deterioration, and/or normal shrinkage within the tolerance of building standards and due to drying or settlement of construction components;[224]

(3) requires a 60-day presuit written notice describing in reasonable

216. *Id.* § 6(c).
217. *See supra* notes 146-48 and accompanying text.
218. *See supra* notes 146-48 and accompanying text.
219. TEX. PROP. CODE ANN. §§ 27.001-.005 (Vernon Supp. 1990).
220. *Id.*
221. *Id.*
222. Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.62 (Vernon Supp. 1990).
223. TEX. PROP. CODE ANN. § 27.002 (Vernon Supp. 1990).
224. *Id.* § 27.003.

detail the construction defects complained of;[225]

(4) allows contractors to reasonably inspect and document alleged construction defects within 21 days following receipt of the notice;[226]

(5) includes a new concept to encourage early settlement of construction defect cases by allowing contractors within 31 days of receiving the notice to offer in writing to repair, or have an independent contractor repair, at the contractor's expense, the defects;[227] and

(6) places limitations on damages and attorney's fees if an owner unreasonably rejects a monetary or repair settlement offer or unreasonably refuses to permit a contractor to repair construction defects.[228]

B. *Historical Overview — Background*

Until the DTPA was enacted in 1973,[229] liability of a contractor for defective residential construction was determined under common law as a matter of negligence, implied warranty, or contract.[230] Under the DTPA, new and additional causes of action were created for conduct alleged as a false, misleading or deceptive act or practice under the DTPA "laundry list,"[231] or if the conduct constituted an unconscionable action or course of action as defined under the DTPA.[232] Claims for breach of express or implied warranties also became actionable under the DTPA.[233] Although the original DTPA did not expressly

225. *Id.* § 27.004(a).

226. *Id.*

227. TEX. PROP. CODE ANN. § 27.004(b) (Vernon Supp. 1990).

228. *Id.* § 27.004(d) (damages may not exceed cost of repairs to remedy defect and attorney's fees limited to those accrued before refusal of settlement).

229. Deceptive Trade Practices-Consumer Protection Act, ch. 143, 1973 Tex. Gen. Laws 322.

230. *See* Humber v. Morton, 426 S.W.2d 554, 555 (Tex. 1968)(holding that builder/vendor impliedly warrants that residence constructed in good and workmanlike manner and is suitable for human habitation); *see also* Westwood Devel. Co. v. Esponse, 342 S.W.2d 623, 627-28 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.)(vendor and builder negligent for building home over sanitary landfill). *See generally* Annotation, *Liability of Builder—Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by defective Condition Thereof*, 25 A.L.R.3d 383 (1969)(discussing various common law and state law remedies available as of 1969).

231. *See* TEX. BUS. & COM. CODE ANN. §§ 17.46, 17.50(a)(1) (Vernon Supp. 1990).

232. *Id.* § 17.45(5) (definition of unconscionable action); *see also id.* § 17.50(a)(3) (DTPA action available for unconscionable acts).

233. *Id.* § 17.50(a)(2).

include real property in the definition of goods, most authorities felt that the legislature intended for the DTPA to apply to real property transactions and construction.[234] To clarify this issue, the DTPA was amended in 1975 to include real property under the definition of "goods."[235]

Among the general purposes of the DTPA is to provide incentives for consumers to sue on small claims that would not be economically feasible without special statutory remedies.[236] These policy-oriented incentives are achieved under the DTPA by excluding most defenses,[237] relaxing causation requirements,[238] providing recovery for attorney's fees,[239] imposing automatic punitive damages upon the first

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234. *See* Woods v. Littleton, 554 S.W.2d 662, 667-68 (Tex. 1977)(services in connection with real estate transaction within DTPA coverage); *see also The Texas Deceptive Trade Practices-Consumer Protection Act: Hearings on Tex. S.B. 48 Before the Senate Comm. on Hum. Res.*, 64th Leg. 2-3, 8-9, 17, 19-20, 22 (Feb. 10, 1975)(witnesses and state senators agree real estate and construction transactions covered by DTPA)(transcripts available from Senate Staff Services and copy on file with Senate Committee on State Affairs).

235. Deceptive Trade Practices-Consumer Protection Act, ch. 62, § 1, 1975 Tex. Gen. Laws 149 (definitions).

236. Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) The Texas Supreme Court observed:

> The DTPA does not represent a codification of the common law. A primary purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit.

Id.; *see also* Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(act designed to encourage consumers to pursue legitimate claims); McDaniel v. Dulworth, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ)(legislative intent behind DTPA was to provide remedy for consumers reluctant to sue); Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 2-3 (1976)(Act's purpose to provide method of protecting consumers).

237. *Smith*, 611 S.W.2d at 616 (supports proposition that common law defenses do not apply to claims brought under DTPA); *see also* Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988)(doctrine of merger not applicable as defense in cause of action brought under DTPA); Ojeda v. Wise, 748 S.W.2d 449, 451 (Tex. 1988)(imputed notice not a defense under DTPA); D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 9.06 (2d ed. 1983 & Supp. 1989).

238. TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1990). Damages under the DTPA are recoverable if the sanctioned conduct is a producing cause of actual damages. This is most significant in actions brought under the DTPA for breach of an express or implied warranty since under both common law and under the Texas Business and Commerce Code, *proximate causation* is necessary for recovery of consequential damages. TEX. BUS. & COM. CODE ANN. § 2.714 (Vernon 1968); *see also* Signal Oil & Gas v. Universal Oil Prods., 572 S.W.2d 320, 328 (Tex. 1978)(standard for recovery under implied warranty action is proximate causation); Rotello v. Ring-a-Round Prods., Inc., 614 S.W.2d 455, 461 (Tex. Civ. App.—Houston 1981, writ ref'd n.r.e.)(mislabeled product producing cause of actual damages).

239. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987); *see also* McDaniel v.

$1,000 damages,[240] and relaxing the standard for a recovery of additional discretionary punitive damages.[241] However, the DTPA incentives apply not only to small claims, but also to complex claims for substantial damages. When applied in large, complex cases, the DTPA incentives create an unnecessary and inappropriate imbalance.[242]

Over the years, this DTPA imbalance has impeded the reasonable resolution of disputes arising from defects in residential design, construction, or repair.[243] For example:

(1) Residential construction involves a substantial investment by contractors and the home owners. Often the amount in controversy in a residential construction dispute is substantial. The DTPA incentives are not necessary to encourage an owner to sue a contractor if he fails to perform as required.[244]

(2) Residential design, construction, and repair is complex and not subject to perfection. In many cases, neither the contractor nor owner become aware of a construction defect until the residence is completed and has been in service for a period of time. Usually, if given a reasonable opportunity, contractors are able to perform necessary repairs or adjustments to cure the construction defect more efficiently than a third party. Consequently, an

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Dulworth, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ). In *McDaniel*, the court observed:

> Our interpretation is in accord with the legislative intent to provide effective relief for aggrieved consumers who would not otherwise sue but for the provisions pertaining to treble damages and to reasonable attorney's fees based upon the amount of work expended rather than the amount of actual damages. To hold otherwise would render ineffective the legislative intent to encourage aggrieved consumers to seek redress and to deter unscrupulous sellers who engage in deceptive trade practices. . . .

McDaniel, 550 S.W. 2d at 396.

240. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1990)(in addition to actual damages awarded in DTPA claim, court must award two times portion of actual damages that does not exceed $1,000).

241. *Id.* The statute states: "If the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages awarded in a DTPA claim that does not exceed $1,000." *Id.*; *see also* Jim Walters Homes v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985)(maximum amount of damages recoverable, including discretionary additional damages, is three times actual damages and not actual damages in addition to three times actual damages).

242. *See* JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP., 71st Leg. 75-88, 101-09, 180-81, 71st Leg. (Dec. 2, 1988).

243. *Id.* at 101-09.

244. *Id.* at 203-11.

award of monetary damages may not always be appropriate or fair. Under the DTPA, however, the owner may proceed directly to suit and judgment for monetary damages and is not required to allow the contractor a reasonable opportunity to cure the defect.[245]

(3) Under the DTPA contractors are unable to rely on traditional defenses.[246] A minor construction defect may result in major structural damage because of neglect or lack of maintenance by the owner. Nevertheless, comparative negligence is not available as a DTPA defense.[247] Although there is some authority that failure to mitigate damages may apply, the courts still are wrestling with this issue.[248]

New chapter 27[249] seeks to restore a fair and appropriate balance to the resolution of residential construction disputes between the contractor and the owner, including DTPA disputes. Chapter 27 allows the contractor to make a timely written offer to settle the dispute by repairing the construction defect complained of,[250] and limits recovery against the contractor if the owner unreasonably rejects the offer or fails to permit the contractor to make the repairs after an offer has been accepted.[251] It also restores certain defenses that uniquely apply to disputes be-

245. *Id.* at 207-11.

246. *See supra* text accompanying note 237.

247. *Id.*

248. *See* Hycel, Inc., v. Wittstruck, 690 S.W.2d 914, 924 (Tex. Civ. App.—Waco 1985, writ dism'd)(holding that DTPA plaintiff entitled recover as damages reasonable and necessary expenses of mitigating economic loss). In *Hycel*, the court observed that the plaintiff had a duty to mitigate losses. However, the issue of mitigating damages as a defense was not before the court. *Id.* A compelling argument arises since the right to recover damages for mitigation expense emanates from the *duty* to mitigate damages. Therefore, if the plaintiff breaches that duty and fails to mitigate damages, the amount of actual damages should be reduced by the amount caused by the failure to mitigate. *See, e.g.*, Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 806 (Tex. Civ. App.—Dallas 1987, no writ)(defendant carries burden of proof on extent to which damages may be mitigated); Great State Petroleum v. Arrow Rig Serv., 706 S.W.2d 803, 807 (Civ. App.—Fort Worth)(also recognizing duty to mitigate damages and allowing recovery for reasonable and necessary sums in complying with this duty), *rev'd and remanded on other grounds*, 714 S.W.2d 429 (Tex. 1986); Orkin Exterminating Co. v. Lesassier, 688 S.W.2d 651, 653 (Tex. Civ. App.—Beaumont 1985, no writ)(party entitled to mitigation).

249. TEX. PROP. CODE ANN. §§ 27.001-.005 (Vernon Supp. 1990).

250. *Id.* § 27.004(b).

251. *Id.* § 27.004(d).

tween a contractor and a home owner.[252]

C. *The New Residential Construction Liability Law: Text and Commentary*

Section 27.001 contains the definitions of the terms appurtenance, construction defect, contractor and residence. Section 27.001(1) provides the following definition of "appurtenance":

> *'Appurtenance' means any structure or recreational facility that is appurtenant to a residence but is not a part of the dwelling unit.*[253]

This definition includes structures and recreational facilities which may not be physically part of the dwelling unit.[254] An appurtenance may be the sole subject of a construction project.[255]

Whether moveable non-fixtures are included as appurtenances is not explicitly addressed in this definition. However, since section 27.002 provides that chapter 27 does not apply to an action to recover damage to "goods,"[256] insofar as a non-fixture is a "good," it is not an appurtenance.[257]

Section 27.001(2) defines "construction defect" as follows:

> *'Construction defect' means a matter concerning the design, construction, or repair of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a contractor. The term 'construction defect' may include any physical damage to the residence or any appurtenance proximately caused by a construction defect.*[258]

This is not a technical definition. Instead, the definition refers to matters[259] concerning design, construction, or repair which are the sub-

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252. *Id.* § 27.003. These defenses are: negligence of a party other than constructor, agent, employee or subcontractor; failure to mitigate damages by party other than contractor, agent, employee or subcontractor; normal wear and tear; and normal shrinkage due to drying or settlement. *Id.*

253. TEX. PROP. CODE ANN. § 27.001(1) (Vernon Supp. 1990).

254. Examples of appurtenances include driveways, fences, patios, decks, swimming pools, and cabanas.

255. *Id.* § 27.001(3). " 'Contractor' means a person contracting with an owner for . . . construction, sale, alteration, addition, or repair of an appurtenance to a *new* or *existing residence*." *Id.* (emphasis added).

256. *Id.* § 27.002.

257. *See infra* notes 285-89 and accompanying text for discussion of "goods."

258. TEX. PROP. CODE ANN. § 27.001(2) (Vernon Supp. 1990).

259. In its most common definition when used as a legal term, "matter" means "substantial facts forming the basis of claim or defense; facts material to issues; substance as distin-

ject of a complaint against a contractor. The definition was drafted to be all inclusive as to claims that arise in connection with the construction process.[260] It includes claims that are actionable as negligence, breach of warranty, or DTPA violations including the DTPA "laundry list"[261] and an unconscionable action or course of action.[262] The definition extends to and includes other physical damage proximately caused by the primary defect.[263]

Hypothetical #1. A fireplace and chimney are improperly constructed. A chimney fire causes smoke damage to the carpet, walls, and ceiling of the residence.

Query. Is the damage to the carpet, walls, and ceiling a "construction defect"?

Result. The defect in the fireplace and chimney is the primary construction defect.[264] Under the section 27.001(1) definition of "construction defect," the damage to the carpet, walls, and ceiling also is a construction defect since the damage was proximately caused by the fire resulting from the primary construction defect.[265]

Section 27.001(3) defines a "contractor" as follows:

> *'Contractor' means a person contracting with an owner for the construction or sale of a new residence constructed by that person or of an alteration of or addition to an existing residence, repair of a new or existing residence, or construction, sale, alteration, addition, or repair of an ap-*

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guished from form; transaction, event, occurrence; subject-matter of controversy." BLACK'S LAW DICTIONARY 882 (5th ed. 1979).

260. The purpose in drafting and framing the definition of "construction defect" in this manner was to avoid restrictive application. This definition also is intended to be inclusive, but not limited to disputes concerning the aesthetic appeal of workmanship, design features which are determined to be unacceptable by the owner, and changes in the work that arise during construction.

261. TEX. BUS. & COM. CODE ANN. §§ 17.46, 17.50(a)(1) (Vernon 1987).

262. *Id.* §§ 17.45(5), 17.50(a)(3).

263. This provision was added by House amendment. H.J. OF TEX., 71st Leg., Reg. Sess. 2511 (1989)(committee subsitute version adopted by House Business and Commerce Committee, May 16, 1989). The legislative history is silent on this provision. It is the understanding of the co-authors of this article that this provision was included to avoid a literal and restrictive interpretation of the definition.

264. "Primary construction defect" is used under this hypothetical to distinguish between the defect the subject of the complaint and other damages proximately caused by the defect.

265. *See* TEX. PROP. CODE ANN. § 27.001(2) (Vernon Supp. 1990). If the facts of this hypothetical also include damage to furniture, such damage would not be a "construction defect" because furniture is a good which is excepted from coverage under section 27.002. *See infra* notes 285-89 and accompanying text.

purtenance to a new or existing residence.[266]

This definition refers only to persons who contract with an owner and are responsible for the construction of the residence.[267] Realtors are not included.[268] A literal interpretation of this definition may conclude that subcontractors are not included under this definition unless the work is performed under a concurrent agreement made directly with the owner, although such a limitation probably was not intended.[269] The definition applies to residential remodeling and remedial construction as well as new residential construction.

"Owner" is not defined. In this definition, as in other provisions of the law, the term should *not* limit application of this reform law to the first owner, but rather, actions brought by subsequent owners also should be covered.[270]

Section 27.001(4) defines "residence" as follows:

> *'Residence' means a single-family house, duplex, triplex, or quadraplex, or a unit in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system.*[271]

This definition of "residence" is specific and contemplates structures

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266. *Id.* § 27.001(3).

267. The definition of "contractor" is not limited to custom construction by the contractor exclusively for the owner. It also includes houses sold to the owner after construction is completed.

268. The phrase "constructed by that person" was added in the House. H.J. OF TEX., 71st Leg., Reg. Sess. 2511 (1989)(Committee substitute version adopted by House Business and Commerce Committee, May 16, 1989). It is intended to clarify that this definition does not include real estate brokers, agents, or other third parties who are not the builder of the dwelling.

269. The phrase in this definition, "[c]ontractor means a person contracting with an owner for the construction or sale," could be interpreted to imply that subcontractors are not within the purview of this definition unless the subcontractor has contracted directly with the owner. However, such an interpretation would not be consistent with the legislative objection underlying this new law. *See supra* notes 243-52 and accompanying text.

270. The corresponding definitions and the other sections of chapter 27 do not refer to "owner," but rather to "claimant" and "person." *See* TEX. PROP. CODE ANN. § 27.001(2) (Vernon Supp. 1990)(a person who has complaint against contractor); *id.* § 27.002 ("this chapter applies to *any action* to recover damage resulting from a construction defect")(emphasis added); *id.* § 27.003(a) (refers to "an *action* to recover damages resulting from a construction defect")(emphasis added); *id.* § 27.004(a) (providing that "before the 60th day preceding the date a *claimant* seeking damages from a contractor arising from a construction defect files suit, the *claimant* shall give notice")(emphasis added).

271. TEX. PROP. CODE ANN. § 27.001(4) (Vernon Supp. 1990).

or units intended for residential use.[272] It also includes the individual units in multi-unit residential housing such as condomimiums[273] and cooperative systems.[274] The definition is not restricted to owner occupied dwellings or units.[275]

Hypothetical # 2. Developer contracts with contractor for the construction of a 20-unit residential condominium complex. Defective plumbing in unsold unit A ruptures and causes structural damage to the unsold unit and other unsold units.

Query. Are the unsold units to be considered a residence as that term is defined in section 27.001(4)?

Result. The most reasonable construction of this definition would conclude that each of the unsold units is a "residence." Under the definition, the construction is classified as a residence at the time of the contract between the contractor and *owner.* "Owner" is not defined and there is no requirement that the owner be a resident of the unit.

Section 27.002 delineates the application of chapter 27 as follows:

> *This Chapter applies to any action to recover damages resulting from a construction defect, except an action for personal injury, survival, or wrongful death or for damage to goods. To the extent of conflict between this Chapter and any other law, including the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code), this Chapter prevails.*[276]

Chapter 27 applies in all actions[277] to recover damages resulting

272. The legislative objective for enactment of this law was to deal specifically with the DTPA imbalance involving residential consumers.

273. Condominium Act, TEX. PROP. CODE ANN. § 81.002(3) (Vernon 1984)(defining "condominium"). " 'Condominium' means a form of real property ownership that combines separate ownership of individual apartments or units with common ownership of other elements." *Id.*

274. TEX. PROP. CODE ANN. § 201.002 (Vernon Supp. 1990). Cooperative system refers to accommodations defined under the Texas Timeshare Act. *Id.* " 'Timeshare estate' means any arrangement under which the purchaser receives a freehold estate or an estate for years in a timeshare property and the right to use an *accommodation* or amenities, or both, in that property for a timeshare period on a recurring basis." *Id.* § 201.002(21) (emphasis added). " 'Accommodation' means any apartment or condominium or *cooperative unit* or hotel or motel room in a building or commercial structure that is situated on a timeshare property and subject to a timeshare regime. *Id.* § 201.002(1) (emphasis added).

275. Neither the definition of residence nor any of the corresponding provisions of chapter 27 require that the residence be occupied by the owner.

276. TEX. PROP. CODE ANN. § 27.002 (Vernon Supp. 1990).

277. It has been suggested that the generic use of the word "action" in referring to the

from a construction defect,[278] except actions to recover damages for (1) personal injury,[279] (2) death, (i.e. survival)[280] and wrongful death,[281] and (3) damage to goods.[282]

Section 27.002 preempts the DTPA cumulative remedies section 17.43 where conflict occurs.[283] Therefore, any action to recover damages resulting from a construction defect in a residence brought under the DTPA is subject to the procedures and remedies of this chapter. This is a most important provision since the legislative purpose of this law is to correct imbalance in actions to recover damages for construction defects brought under the DTPA.[284]

As initially passed by the Senate, chapter 27 did not include the exception for personal injury, death, or damage to goods. These exceptions were added by the House.[285] The exception for "damage to goods" raised questions concerning legislative intent since the term

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exceptions to chapter 27 will preclude applicability of the chapter in any claim if one of the exceptions is alleged in the claimant's pleadings. *See* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.15 (Supp. 1989). However, such a strained interpretation would lead to an erroneous and absurd result that would completely frustrate and circumvent the legislative purpose underlying chapter 27 and also would violate a fundamental rule of statutory construction that the meaning of a word used in a statute must be determined by considering the object and purpose of the statute in which the word is employed. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)(court's task is to interpret words of statute in light of purpose legislature intended to serve); Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940)(statute must be construed in light of its purpose and literal reading to be avoided if leads to absurd results in light of legislative purpose); Brown v. Owens, 674 S.W.2d 748, 750 (Tex. 1984)(in determining meaning of word in statute, court must consider entire act, its nature and object, and consequences following from each construction); *accord* Abercrombie v. Gilfoil, 205 So. 2d 461, 464 (La. Ct. App. 1967)(proper construction of exceptions in statute providing right to jury trial denominated generically as "suits," "proceedings," or "case" required conclusion that the legislature intended terms to be synonymous with "cause of action" which allowed jury trial on other issues brought in same action which were not included as exceptions).

278. *Id.* § 27.001(2). For a discussion of the definition of construction defect, see *supra* notes 258-65 and the accompanying text.

279. For discussion of the 1989 amendments to the DTPA which apply chapters 33 and 41 of the Texas Civil Practices and Remedies Code in cases seeking damage for personal injury or death brought under the DTPA, see *supra* Section II of this article.

280. TEX. CIV. PRAC. & REM. CODE § 71.021 (Vernon 1986).

281. TEX. CIV. PRAC. & REM. CODE §§ 71.001-.011 (Vernon 1986).

282. *See infra* notes 286-90 for a discussion of this exception as it applies to damage to goods.

283. TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon 1987).

284. *See supra* notes 243-52 and accompanying text.

285. H.J. OF TEX. 71st Leg., Reg. Sess. 2511 (1989)(committee substitute version adopted by House Business and Commerce Committee, May 16, 1989).

"goods," as defined and applied under the DTPA, includes "real property." However, Senator Montford, in moving to concur with the House amendments, clarified the legislative intent by declaring that the term "goods" as used in this section of the Act refers only to the contents of the residence, other personal property and moveable goods.[286] Senator Montford further clarified that the term "goods" is not intended to include a residence or any damage to the residence.[287]

To interpret "goods" as used in the exception clause of section 27.002 to include a residence or appurtenance would be clearly wrong. The legislative concern in enacting chapter 27 was to adjust imbalance resulting from previous unfair applications of the DTPA in residential construction cases.[288] An interpretation to the contrary also would conflict with the general rule of statutory construction that requires the courts to harmonize all relevant laws in a manner consistent with public policy and the problems sought to be remedied by the legislation being construed.[289]

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286. Debate on Tex. S.B. 1012 on the Floor of the Senate, 71st Leg., Reg. Sess. (May 9, 1989)(transcript available from Senate Staff Services). The debate went as follows:

> MONTFORD: Mr. President, members, Senate Bill 1012 is the home builder's bill. The House made some amendments to this bill and I would like to address those . . . [A]dditionally, relative to the term "goods," I would like to indicate that it is my intent that relative to this provision, even though this was added in the House, the phrase "damages to goods" as used in § 27.002, excepts from applicability of this bill such goods as moveable personal property, like the contents of a residence, and as used in this bill, goods does not include and does not except the residence itself or any damages to a part of the residence. . . .
>
> MONTFORD: I talked to the House sponsor of that amendment on that change on page 2. It's my intent, as I stated, as used in this bill, "goods" does not include and does not except the residence itself or any damages to any part of the residence and we're talking about furniture, other types of moveable goods, and I would say that's what goods include, but I think the point has to be clarified under the act.
>
> CAPERTON: You think goods is defined differently than under DTPA?
>
> MONTFORD: Well, I think that if you read goods in context with the language of that bill, it's a compatible definition.
>
> CAPERTON: Okay, and you agree with me that in the DTPA goods means tangible chattels or real property . . . I think that is it, isn't it.
>
> MONTFORD: I think the, now I didn't put that amendment, I didn't make the change, Representative Wolens made that change in the House. I think under this bill, the intent is as I have stated.

Id.

287. *Id.*

288. *See supra* notes 243-52 and accompanying text.

289. *See* Texas Dep't of Pub. Safety v. Schaejbe, 687 S.W.2d 727, 728 (Tex. 1984). The Supreme Court in *Schaejbe* stated: "When an apparent conflict exists, it is the duty of the courts to resolve inconsistencies and effectuate the dominant legislative intent." *Id.* (citing

Montford et al.: 1989 Texas DTPA Reform: Closing the DTPA Loophole in the 1987 Tor

The scope of liability under chapter 27 is set out in section 27.003 as follows:

> *(a) In an action to recover damages resulting from a construction defect, a contractor is not liable for damages, or any percentage of damages, caused by:*
>
> *(1) negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor;*
>
> *(2) failure of a person other than the contractor or an agent, employee, or subcontractor of the contractor to take reasonable action to mitigate the damages;*
>
> *(3) normal wear, tear, or deterioration; or*
>
> *(4) normal shrinkage due to drying or settlement of construction components within the tolerance of building standards.*
>
> *(b) Except as provided herein, this Chapter does not limit or bar any other defense or defensive matter or other cause of action applicable to an action to recover damages resulting from a construction defect.*[290]

The matters included under this section achieve significant reform with respect to construction defect cases brought under the DTPA. Other than as now provided under chapter 27 for residential construction claims, comparable defenses may not be applicable in other types of cases actionable under the DTPA.[291] During the 1988 hearings held by the DTPA study committee and those held as part of the 1989 legislative process, the absence of defenses was a frequently cited source of DTPA imbalance.[292]

Under the "comparative causation"-type defense provided under

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Southern Canal Co. v. State Bd. of Water Eng'rs, 159 Tex. 227, 234, 318 S.W.2d 619, 624 (Tex. 1959)). Moreover, in all interpretations, the court shall look diligently for the intention of the legislature, keeping in view "at all times the old law, the evil, and the remedy." TEX. GOV'T CODE ANN. § 312.005 (Vernon 1988); *see also* State v. Terrell, 588 S.W.2d 784, 786 (Tex. 1979)(fundamental rule controlling construction of statute is to ascertain, if possible, intent of legislature). In construing conflicting provisions of two statutes, the Texas Supreme Court observed:

> Since both Articles 5453 and 5463 are integral parts of what is clearly a comprehensive legislative scheme, they must be construed together in such a way as to achieve the presumed legislative intent to create a consistent and sensible set of regulations. A construction which creates a conflict among the various parts of the legislative plan is, if possible, to be avoided.

Trinity Universal Ins. Co. v. Palmer, 412 S.W.2d 691, 695 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

290. TEX. PROP. CODE ANN. § 27.003 (Vernon Supp. 1990).

291. *See supra* notes 237, 246-48.

292. *See* JOINT COMM. ON DECEPTIVE TRADE PRACTICES REP. 71st Leg. (Dec. 2, 1988).

this section, a contractor is not liable for damages—or any percentage of damages—caused by any of the enumerated defensive matters. Because there is no associated provision in chapter 27 for joint and several liability, the better construction of this section is that a contractor is not jointly and severally liable for damage caused by a third party if the damage results from the conduct or other matters set forth in this section.[293]

This section provides a "pure" comparative apportionment system for the defensive matters enumerated.[294] A causal link must be established between the conduct or condition giving rise to the defense and the damages sustained by the claimant.[295] Proximate causation will be the appropriate requirement for the negligence and mitigation defenses.[296] Producing cause will apply in the ordinary wear and tear and normal shrinkage defenses.

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293. The legislative intent to exclude a contractor from joint and several liability is apparent from the language of section 27.003, and also from the provisions of other statutes where the legislature intended to provide for joint and several liability. A comparison of the language in section 27.003 with other similar statutory provisions reveals the legislative decision to except contractors from joint and several liability in connection with any damages caused by one of the enumerated defensive matters. *See* TEX. CIV. PRAC. & REM. CODE § 33.013 (Vernon Supp. 1990)(includes language similar to that used in section 27.003 of code). Section 27.003 expressly provides for joint and several liability by stating:

> (a) Except as provided in subsections (b) and (c), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.
>
> (b) Notwithstanding subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under § 33.012 with respect to a cause of action if:
>
> (1) the percentage of responsibility attributed to the defendant is greater than 20 percent; and
>
> (2) only for a negligence action pursuant to section 33.001 (a) or (c), the percentage of responsibility attributed to the defendant is greater than the percentage of responsibility attributed to the claimant.

Id. § 27.003.

294. Under a pure comparative apportionment system, the claimant can recover the percentage of damages caused by the defendants, regardless of the extent of his own causation. *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428 (Tex. 1984).

295. Section 27.003 does not specify whether producing cause or proximate cause is required to establish a nexus between the conduct or conditions asserted and the resulting harm or damage. The authors of this article suggest that the causation requirements applicable to the conduct or conditions under common law are appropriate under this section. *See* 1 J. EDGAR & J. SALES, TEXAS TORTS & REMEDIES § 1.07[1][b] (1987).

296. Proximate cause is a proper causation standard in negligence cases. Colvin v. Red Steel, 682 S.W.2d 243 (Tex. 1984); Lucas v. Texas Indus., 696 S.W.2d 372 (Tex. 1984); Rosas

Comparative causation is a familiar concept in the tort and warranty field as it applies to concepts of negligence[297] and failure to mitigate damages.[298] However, defensive matters in section 27.003 concerning *"normal wear, tear, or deterioration"*[299] and *"normal shrinkage due to drying or settlement of construction components"*[300] have not been applicable to a comparative apportionment system prior to this new law.

Subsection (b) of section 27.003 is a "savings clause" which preserves all defenses, defensive matters or causes of action that are not in conflict with this new law.

Practice Note. If a jury question is submitted to obtain a finding under one or more of the section 27.003 defensive matters, it is suggested that the questions be submitted in a form similar to the submission of comparative causation under *Duncan v. Cessna*.[301] If part or all of the plaintiff's case also includes an action under the DTPA, the liability and damage questions concerning damage to the structure or appurtenance and damage to goods should be submitted in separate clusters since damage to goods is not subject to the provisions of chapter 27 and will not be subject to any reduction or bar because of an affirmative finding to one of the defensive matters submitted under

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v. Buddies Food Store, 518 S.W.2d 534 (Tex. 1973); 1 J. EDGAR & J. SALES, TEXAS TORTS & REMEDIES § 1.01 (1987).

Failure to mitigate damages is a variant of the contributory negligence concept which focuses on the reasonableness of the claimant's conduct. Therefore, the proper causation standard is proximate cause. *See Duncan*, 665 S.W.2d at 423 (assumed risk and unforeseeable misuses observed to be extreme variants of the contributory negligence which focuses on reasonableness of plaintiff's conduct); *see also* Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 750 (Tex. 1980)(defensive issues in product liability case, misues, failure to follow proper warning instructions, and voluntary assumption of risk were sub-issues of contributory negligence).

297. This theory of apportionment is substantially the same as the system formulated by the Texas Supreme Court in *Duncan v. Cessna*. 665 S.W.2d at 424-29.

298. *Id. See generally* 28 TEX. JUR. 3d *Damages* § 29 (1983)(discussion of defense of failure to mitigate damages).

299. This term refers to damages caused by the normal aging and wearing process that will occur without a construction defect.

300. "Normal shrinkage due to drying or settlement of construction components, within the tolerance of building standards" refers to those elements of construction that are reasonably anticipated and recognized within the building standards applicable to the construction in question or within the vicinity or jurisdiction where the construction took place.

301. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 427 n.8 (Tex. 1984). For sample questions patterned after the question formulated in *Duncan*, see Appendix II.

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section 27.003.[302] An additional cluster of issues will be required if the action also includes a claim for personal injury or death caused by a construction defect since apportionment of damages for those claims are also excepted from coverage under chapter 27.[303]

Section 27.004 provides intricate presuit requirements of notice and treatment of offers of settlement in actions seeking to recover damages arising from construction defects. These provisions include an important DTPA reform objective by providing for a reasonable opportunity to repair and cure construction defects before litigation begins.[304] Section 27.004(a) provides:

> *Before the 60th day preceding the date a claimant seeking from a contractor damages arising from a construction defect files suit, the claimant shall give written notice to the contractor, at the contractor's last known address, specifying in reasonable detail the construction defects that are the subject of the complaint. During the 21-day period after the date the contractor receives the notice, the contractor shall be given a reasonable opportunity to inspect and have inspected the property that is the subject of the complaint to determine the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect. The contractor may take reasonable steps to document the defect.*[305]

The claimant must provide the contractor with written notice which describes the construction defects in reasonable detail[306] at least 60 days prior to suit. The contractor is then allowed 21 days from receipt of the notice to inspect the property and to take reasonable steps, such as photography or engineering analysis, to document the defects.

Subsection 27.004(a) expressly provides that the contractor's inspection rights under this reform law are in addition to the rights of

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302. *See supra* notes 277-90 and accompanying text for a discussion of the provisions of section 27.002.

303. *See* Section II, notes 74-90 for a discussion of the new amendments to the DTPA which require application of comparative responsibility to DTPA actions seeking recovery for personal injury or death or property damage other than the good or service which is the subject of the complaint.

304. *See supra* notes 244 and 246.

305. TEX. PROP. CODE ANN. § 27.004(a) (Vernon Supp. 1990).

306. "[R]easonable detail" contemplates sufficient notice to the contractor to facilitate identification and inspection of the defect. While the claimant may not have sufficient knowledge or expertise to identify or diagnose latent defects, any symptoms of a latent defect which are reasonably apparent, should be described in the notice. The notice should also be sufficiently specific with regard to the location of the defect to allow the contractor to identify and inspect.

inspection provided at common law or by any other statute, including DTPA section 17.505.[307] The 1989 amendments to the DTPA, discussed in Section III of this article, increase the period for presuit notice under the DTPA from 30 to 60 days and provide a right to inspect during the 60-day period.[308] The 21-day limitation on inspection provided under section 27.004(a) does not preempt DTPA section 17.505.[309] Contractors also have a right to inspect the property under the new 60-day DTPA provision.[310]

Section 27.004(b) provides:

> *Within the 31-day period after the date the contractor receives the notice, the contractor may make a written offer of settlement to the claimant. The offer may include an agreement by the contractor to repair or have repaired by an independent contractor at the contractor's expense, any construction defect described in the notice and shall describe in reasonable detail the kind of repairs which will be made. The repairs shall be made within the 45-day period after the date the contractor receives written notice of acceptance of the settlement offer, unless completion is delayed by the claimant or by other events beyond the control of the contractor. For the purposes of this Section, "independent contractor" means a person who is independent of the contractor and did not perform any of the work complained of in the claimant's notice.*[311]

Section 27.004(b) allows the contractor to make a written offer to settle the matters complained of in the presuit notice. The offer may include a monetary settlement or a proposal to repair the defects at the contractor's expense.[312] The contractor has an option to include a proposal to appoint an independent contractor to perform the repairs in the offer to repair.[313] The repair proposal must include a description in reasonable detail of the kinds of repairs to be made.[314] The term "independent contractor" is defined for purposes of section

307. TEX. PROP. CODE ANN. § 27.004(l) (Vernon Supp. 1990).

308. *See supra* notes 126, 164-79 and accompanying text.

309. *See supra* notes 126, 164-79 and accompanying text.

310. *See supra* notes 126, 164-79 and accompanying text.

311. TEX. PROP. CODE ANN. § 27.004(b) (Vernon Supp. 1990).

312. *Id.* § 27.004(d). Nothing in chapter 27 appears to preclude a combined monetary settlement offer and a proposal to repair.

313. *Id.* § 27.004(b).

314. *Id.* § 27.004(c). The proposal to repair should describe the specific repair to be performed for each defect included in the complaint. Detailed engineering analysis, blue prints, or drawings should not be required; however, the description should provide sufficient information to allow the claimant to reasonably evaluate the proposal.

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27.004(a) to mean a person who is not associated with the contractor and who did not perform any of the complained of work.[315]

The repair must be completed within 45 days following receipt of the owner's written acceptance of the offer to repair.[316] This period may be extended if the repairs are delayed by the owner or by other events beyond the contractor's control.[317]

Section 27.004(c) states:

> *If the giving of the notice under Subsections (a) and (b) within the period prescribed by those subsections is impracticable because of the necessity of filing suit at an earlier date to prevent expiration of the statute of limitations, or if the complaint is asserted as a counterclaim, that notice is not required. However, the suit or counterclaim shall specify in reasonable detail each construction defect that is the subject of the complaint, and the inspection provided for by Subsection (a) may be made during the 21-day period following the date of service of the suit or counterclaim on the contractor, and the offer provided for by Subsection (b) may be made within the 31-day period following the date of service. If, while a suit subject to this chapter is pending, the statute of limitations for the cause of action would have expired and it is determined that the provisions of Subsection (a) were not properly followed, the suit shall be abated for up to 75 days in order to allow compliance with Subsections (a), (b) and (f).*[318]

This subsection provides two exceptions to the requirement of presuit notice. These exceptions apply only when limitations will expire during the waiting period following giving notice and when the complaint is asserted as a counterclaim.[319]

Although presuit written notice is not required under these exceptions, the owner's original pleadings in the suit or counterclaim must

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315. This definition of "independent contractor" is tailor-made for section 27.004. The purpose of including this definition was to provide a proper description for the alternative of a third party repair. The definition is designed to achieve the objective of designating a person who has had no prior connection or interest in the work complained of in the claimant's notice or pleadings.

316. TEX. PROP. CODE ANN. § 27.004(b) (Vernon Supp. 1990).

317. *Id.* This provision in subsection (b) was included in contemplation that there would be occasions when events beyond the control of the contractor, including an uncooperative plaintiff, will prevent the repairs being made within the 45-day limit. Specific events beyond the control of the contractor include strikes, labor, unforeseeable delays in acquiring the components necessary to complete the repairs, illness of the contractor or other similar unforeseeable occurrences.

318. *Id.* § 27.004(c).

319. *Id.*

describe the construction defects in *reasonable detail.*[320] Following the pleading or counterclaim, the contractor will have the same right of inspection and the same settlement alternatives and is subject to the same time limits as provided in subsections 27.004(a) and 27.004(b).[321] Computation of the time limits in these cases begins on the day of service of the owner's pleading or counterclaim.[322]

If, after suit is filed, it is determined that the requirements of subsection 27.004(a) were not properly followed, the court may abate the suit for a period up to 75 days to allow compliance with subsections (a), (b), and (f), *if* limitations will prevent refiling the suit.[323] This provision implies that dismissal of the suit may be required if it is found that proper notice under subsection (a) has not been given. Abatement is expressly provided under this subsection *only* if refiling will be prevented by expiration of the applicable limitations period.[324]

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320. TEX. PROP. CODE ANN. § 27.004(b) (Vernon Supp. 1990). The original pleading in a suit or a counterclaim must describe the construction defects under the same "reasonable detail" requirement for the presuit notice. *See supra* note 306 and accompanying text.

321. *Id.* § 27.004(c); *see also supra* notes 306-310 and accompanying text regarding section 27.004(a) (contractor shall have opportunity to inspect or have premises inspected within 21 days from date of service of complaint or counterclaim and take reasonable steps to document defect). Under section 27.004(b), a contractor may make written offer of settlement within 31 days from the date of service of the complaint or counterclaim. TEX. PROP. CODE ANN. § 27.004(b) (Vernon Supp. 1990). The offer may include monetary settlement or proposal to repair by the contractor or by an independent contractor. TEX. PROP. CODE ANN. § 27.004(b) (Vernon Supp. 1990). The repairs must be completed within "45 days after the date the contractor receives written notice of acceptance of the settlement offer," and the 45-day time limit to repair may be extended if delays are occasioned by the claimant or by other events beyond the control of the contractor. *Id.*

322. TEX. PROP. CODE ANN. § 27.004(c) (Vernon Supp. 1990). All computations of time under this chapter, including those under section 27.004(c) should be made according to the provisions in section 311.014 of the Texas Government Code. TEX. GOV. CODE ANN. § 311.014 (Vernon 1988).

323. TEX. PROP. CODE ANN. § 27.004(b), (c) (Vernon Supp. 1990).

324. *Id.* This subsection deals with the consequences of filing suit after repairs have been made as provided in section 27.004. In those cases where limitations will not prevent refiling the suit, dismissal rather than abatement is the better and more appropriate construction of this subsection in carrying out the legislative intent in chapter 27. The legislative purpose in requiring presuit notice and opportunity to repair was to avoid litigation. During Senate debate on the motion to concur with the House amendments and final passage of S.B. 1012, Senator Montford stated:

> I say to you though I believe with passage of this bill, there will be a much more expeditious . . . procedure instead of everybody just running to the courthouse, I think it will give both the consumer and the owner, the builder, time to respond in a timely fashion . . . to inspect and get, to get the problem cured.

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Where a claimant unreasonably rejects an offer, the following provisions of section 27.004(d) apply:

> *If a claimant unreasonably rejects an offer made as provided by this section or does not permit the contractor or independent contractor a reasonable opportunity to repair the defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of the reasonable cost of the repairs which are necessary to cure the construction defect and which are the responsibility of the contractor and may recover only the amount of reasonable and necessary attorney's fees and costs incurred before the offer was rejected or considered rejected.*[325]

This subsection embodies the legislative objective to encourage settlement of claims involving residential construction.[326] If the owner unreasonably rejects either a monetary settlement offer or an offer that includes a proposal to repair made in compliance with this section, or if the owner does not allow a reasonable opportunity to repair pursuant to an accepted settlement offer and proposal to repair, the owner's recovery is limited to cost of repairs and attorney's fees incurred before the offer is rejected or considered rejected.[327]

The determination of a *reasonable rejection* of a section 27.004 settlement offer will ordinarily be determined by the trier of fact.[328] The threshold element of this determination is whether the repair is feasible and does not involve unreasonable economic waste.[329] If a propo-

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Debate on S.B. 1012 on the Floor of the Senate, 71st Leg., Reg. Sess. (May 9, 1989)(transcript available from Senate Staff Services).

There is no provision in section 27.004(c) or in any other provision of chapter 27 that allows abatement if presuit notice is not given or is improper unless limitations will prevent refiling. If the legislature had intended to allow abatement for failure to file presuit notice or for giving improper notice in any case, an express provision allowing for abatement would have been included.

325. TEX. PROP. CODE ANN. § 27.004(d) (Vernon Supp. 1990).

326. *See supra* note 245 and accompanying text.

327. TEX. PROP. CODE ANN. § 27.004(f) (Vernon Supp. 1990). An offer is "considered rejected" if it is not accepted in writing within 25 days from the date it is received by the claimant. *Id.* Section 27.004(b) requires that acceptance of an offer to repair must be in writing.

328. *See* State Farm County Mut. Ins. Co. of Tex. v. Plunk, 491 S.W.2d 728, 731 (Tex. Civ. App.—Dallas 1973, no writ)(questions of "reasonableness" are ordinarily matters of fact).

329. *See* Hutson v. Chambless, 300 S.W.2d 943, 944-45 (Tex. 1957)(damages in construction defect case shall be construed as difference in value between building as constructed and its value had it been constructed according to the contract is proper where cost of repairs excessive and where repairs would require demolition and rebuilding); *see also* Jim Walter Homes v. Mora, 622 S.W.2d 878, 883 (Tex. Civ. App.—Corpus Christi 1981, no writ). In *Mora*, the court observed:

sal to repair would not impair the structure as a whole, rejection of the proposal may be unreasonable unless some other factor is involved.[330] On the other hand, if the proposal would require that the structure, in whole or in material part, be changed or is unfeasible, the rejection may be reasonable.[331]

As used in this subsection the term "independent contractor" refers to a person who is performing repairs at the request of a contractor pursuant to a section 27.004 settlement offer that includes a proposal to repair.

Hypothetical # 4. Owner discovers a construction defect in the chimney and fireplace. Rather than notify the contractor of the defect, owner employs a third party to perform the repairs. After repairs are completed, owner gives contractor the required notice under subsection 27.004(a) and proceeds to suit. Contractor timely tenders a monetary settlement offer in an amount equal to the charges made for the repairs. Owner rejects the settlement offer because it does not include any compensation for mental anguish.

Result. Chapter 27 is silent as to the requirements for a monetary settlement offer. However, a viable argument can be made that any offer to settle which includes the actual cost of repairs and reasonable and necessary attorney's fees incurred up to the time of the settlement offer may not be reasonably rejected.[332]

> In construction contract cases, where the contractor breaches because of defective construction, Texas courts allow damages based on cost of repair, if repair is feasible and does not involve unreasonable economic waste. Where the correction of defects would require that the construction, in whole or in material part, be changed, or the expense of such repair would be great, the correct measure of damages is the difference in the value of the structure as constructed and its value had it been constructed without defects. Where the correction of defects and deviations would not impair the structure as a whole, the remedial cost is an appropriate measure of damages.

Mora, 662 S.W.2d at 883; *see also* Green v. Bearden Enters., Inc., 598 S.W.2d 649, 652 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); Rogowicz v. Taylor & Gray, Inc., 498 S.W.2d 352, 354 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.).

330. *Mora*, 662 S.W.2d at 883.

331. *Id.*

332. If presuit notice given under section 27.004 includes a demand for attorney's fees, any monetary settlement offer under section 27.004(b) should also include an offer in an amount of the reasonable and necessary attorney's fees and costs incurred. Failure to offer reasonable and necessary attorney's fees could be argued as the basis for a reasonable rejection of a settlement offer. TEX. PROP. CODE ANN. § 27.004(j) (Vernon Supp. 1990). Under section 27.004(d), even if the offer is unreasonably rejected, plaintiff is entitled to recover costs of repairs and reasonable and necessary attorney's fees "incurred before the offer was rejected or considered rejected." *Id.* § 27.004(d).

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Practice Note. In those cases where repairs have been unsuccessfully attempted by the contractor before presuit notice, the contractor should consider a proposal to have the repair performed by an independent contractor. This could serve as a useful counter-argument to an argument that an owner's rejection of the repair proposal is reasonable because prior actions or omissions by the contractor show that he is incapable or incompetent to perform the necessary repairs.

If the repairs required to cure the construction defect are substantial and will present an inconvenience to the owner, i.e., the premises may not be occupied during the repairs, it is suggested that the contractor include in the repair offer a proposal to reasonably compensate the owner for the cost of alternative housing. This is not expressly required under this Act, but is suggested relative to possible arguments regarding reasonableness *vel non* of an owner's rejection of a section 27.004 offer.[333]

If the owner rejects a section 27.004 settlement offer, it may be advantageous to the owner to set forth the basis for the rejection in writing provided to the contractor prior to the expiration of the period for accepting the offer. This is not a requirement under the Act.[334]

Section 27.004(e) contains the following provisions which apply when a claimant reasonably rejects an offer or a contract fails to make an offer or repairs:

> *If a claimant reasonably rejects an offer, a contractor fails to make an offer under this section, or a contractor fails to repair the defects within the time allowed by this section in a good and workmanlike manner, the limitations on damages and defenses to liability provided for in this section shall not apply.*[335]

Reasonable rejection of a monetary settlement offer or a proposal to repair will release the owner from the limitations on damages and defenses provided under section 27.004.[336] However, defenses provided under section 27.003 will still apply.[337]

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333. TEX. PROP. CODE ANN. § 27.004(d) (Vernon Supp. 1990).

334. *Id.* § 27.004(c).

335. *Id.* § 27.004(e).

336. *Id.* § 27.004(d) (if rejection of proposal to repair unreasonable or if contractor not given reasonable opportunity to repair construction defect after offer to repair has been accepted, damages limited to cost of repairs and reasonable and necessary attorney's fees incurred before offer to repair rejected or considered rejected); *see also id.* § 27.004(f) (if suit filed after contractor makes repairs which cure construction defect, claimant's suit barred).

337. TEX. PROP. CODE ANN. § 27.003 (Vernon Supp. 1990). Some authors have sug-

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Failure by the contractor to meet the repair deadline under this subsection will result in the contractor not having the protections provided under section 27.004. However, the defenses to liability provided in section 27.003 will still apply.[338]

This subsection also clarifies that the repairs must be made in a good and workmanlike manner.[339] If the repairs are not so performed, the owner may sue without giving any further notice under subsection 27.004(a) concerning defective repairs.[340]

Section 27.004(f) includes the following provisions which apply when a contractor makes repairs but the claimant still files suit:

> *If suit is filed after a contractor makes repairs as provided by this section, the claimant may not be awarded damages arising from the construction defect, attorney's fees, or costs unless the trier of fact finds that the attempt to repair was not made in good faith and did not cure the construction defect described in the notice.*[341]

This subsection further implements the legislative goal of encouraging early resolution of disputes concerning construction defects.[342] No damages or attorney's fees may be awarded to a owner if the repairs made pursuant to this subsection cure the defect or defects described in the notice.

For the subsection 27.004(f) defense to apply the repairs must not only cure the construction defects, but also have been made in *good faith.* The purpose for this requirement is not clear from the legislative history. It may be that the good faith proviso is aimed at assuring that the repairs both cure the construction defect and do so in a manner that reasonably complies with the plans and specifications of the

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gested that if an owner reasonably rejects an offer, a contractor fails to make an offer, or a contractor fails to repair within the time limits required and in a good and workmanlike manner, none of the provisions in chapter 27 apply. *See* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 2.05 (Supp. 1989). This suggestion is based on an erroneous reading of chapter 27. Subsection (e) provides only that "limitations on damages and defenses to liability provided for in this section shall not apply." TEX. PROP. CODE ANN. § 27.004(e) (Vernon Supp. 1990). Defenses to liability provided under section 27.003 would still apply because they are contained in separate section.

338. *See supra* notes 290-303 and accompanying text.

339. TEX. PROP. CODE ANN. § 27.004(e) (Vernon Supp. 1990).

340. *Id.* § 27.004(a). Even if the repairs are not performed in a good and workmanlike manner, the contractor continues to retain the right to assert the defenses enumerated in section 27.003 in connection with damages caused by either the original construction defect or damages caused by any failure to perform the repairs in a good and workmanlike manner.

341. *Id.* § 27.004(f).

342. *See supra* note 245.

original construction contract, unless those requirements have been modified by a subsequent accepted proposal to repair.

Section 27.004(g) provides that any offer which is not accepted within 25 days is deemed to have been rejected automatically. Section 27.004(g) states:

> *An offer of settlement made under this section that is not accepted before the 25th day after the date the offer is received by the claimant is considered rejected.*[343]

This subsection is self-explanatory.[344]

Section 27.004(h) states:

> *An affidavit certifying rejection of a settlement offer under this section may be filed with the court. The affidavit may not be offered into evidence or referred to by a party in the presence of the jury on trial of the case.*[345]

This subsection does not operate to preclude, when appropriate, admitting evidence of a settlement offer or rejection. It applies only to an affidavit of rejection filed pursuant to this section. Settlement offers and rejections should not be admissible, except in those cases where the contractor raises a defense under subsection 27.004(d), which bars or limits a claim if the owner unreasonably rejects a settlement offer or does not permit the contractor a reasonable opportunity to repair pursuant to an accepted settlement offer.[346]

Practice Note. A contractor who makes an offer to settle the case pursuant to section 27.004 may consider including a provision in the written settlement offer that clarifies that the settlement offer is not an admission of liability. Nothing in chapter 27 requires the contractor to admit a construction defect or to admit liability for a construction defect in order to be entitled to the provisions of this reform law.

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343. TEX. PROP. CODE ANN. § 27.004(g) (Vernon Supp. 1990).

344. *Id.* § 27.004(b). Acceptance of a settlement offer which includes a proposal to repair must be made in writing. *See supra* notes 312, 316-318; *see also* TEX. PROP. CODE ANN. § 27.004(b) (Vernon Supp. 1990). Chapter 27 is silent with regard to the proper mode of acceptance of a monetary settlement offer. Better practice would be to require written acceptance of a monetary settlement offer, although this does not appear to be required under chapter 27.

345. TEX. PROP. CODE ANN. § 27.004(h) (Vernon Supp. 1990).

346. *Id.* § 27.004(h). The admissibility of an offer of settlement is strictly a matter of relevance. *See* TEX. R. CIV. EVID. 408. A settlement offer made in accordance with the provisions of section 27.004(b) would be relevant only if the contractor asserts a defense under subsection 27.004(d) which bars or limits a claim.

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Section 27.004(i) includes the following provision which permits a contractor to preserve evidence of repairs made:

> *A contractor who makes or provides for repairs under this section is entitled to take reasonable steps to document the repair and to have it inspected.*[347]

This provision requires little explanation. It simply allows the contractor to have repairs made pursuant to section 27.004 and inspected by a third party to reasonably preserve evidence of the repairs. The subsection does not indicate whether the owner is entitled to discovery of the inspector's report, findings, conclusions, or opinions. The Texas Rules of Civil Procedure regarding discovery should determine the answer to that question after a lawsuit is filed.[348]

Practice Note. It is suggested that under some circumstances the owner who accepts an offer to repair may want to negotiate for the repairs to be inspected by an independent third party and for the results to be disclosed to the owner.

Where a defect creates an imminent threat to the health and safety of the occupants of a residence, section 27.004(j) requires the following:

> *Notwithstanding Subsections (a), (b), and (c), a contractor who receives written notice of a construction defect resulting from work performed by the contractor or an agent, employee, or subcontractor of the contractor and creating an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable. If the contractor fails to cure the defect in a reasonable time, the owner of the residence may have the defect cured and may recover from the contractor the reasonable cost of the repairs plus attorney's fees and costs in addition to any other damages recoverable under any law not inconsistent with the provisions of this chapter.*[349]

Subsection (j) is an additional and overriding requirement to the notice and settlement provisions under subsections (a), (b), and (c). It applies only in those cases where a construction defect creates an *imminent*[350] *threat* to the health and safety of the inhabitants of the resi-

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347. *Id.* § 27.004(i).
348. TEX. R. CIV. P. 166b.
349. TEX. PROP. CODE ANN. § 27.004(j) (Vernon Supp. 1990).
350. *Id.* § 27.004(j). "Imminent" generally is defined as dangerous and close at hand, threatening to happen at once, impending as contrasted with projected or anticipated. *See* 20 WORDS AND PHRASES *Imminent* (Supp. 1989-90).

dence. Upon receipt of written notice of such a condition, a contractor is required to take reasonable steps to cure the defect as soon as practicable.[351] If the construction defect is not cured within a reasonable time,[352] the owner may proceed to sue without following the requirements under subsections (a), (b), and (c). Subsection (j) does not affect the applicability of section 24.003 relating to certain defenses and defensive matters to be asserted by the contractor arising from the construction defect.

Subsection (j) was included at the request of Sen. Eddie Bernice Johnson (D-Dallas) who was concerned that the time periods specified in subsections (a), (b), and (c) may not be responsive to emergency situations where the health and safety of the inhabitants of a residence is threatened. This subsection addresses that concern and allows time limits to be controlled on a case by case basis, depending on the facts and circumstances.

Section 27.004(k) expressly states that a contractor may make an offer of money in place of damages. Section 27.004(k) states:

> *This section does not preclude a contractor from making a monetary settlement offer.*[353]

This provision was added to clarify that a monetary settlement can be offered by a contractor in lieu of or as part of a proposal to repair.

The language of section 27.004(l) makes the inspection and repair provisions of chapter 27 cumulative of any other rights of inspection and repair. Section 27.004(l) states:

> *The inspection and repair provisions of this chapter are in addition to any rights of inspection and settlement provided by common law or by another statute, including Section 17.505, Business & Commerce Code.*[354]

This subsection is discussed and explained in the comments under

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351. *Id.* § 27.004(j). "Practicable" is generally construed to mean within a reasonable time given the nature of the event or circumstance in question. *See* State Farm County Mut. Ins. Co. of Tex. v. Plunk, 491 S.W.2d 728, 731 (Tex. Civ. App.—Dallas 1973, no writ). As used in this section, the term "practicable" should mean "reasonable" when considering the extent of the defect that needs to be repaired and the requirements for completing the repair in a good and workmanlike manner.

352. *See Plunk*, 491 S.W.2d at 731. "Reasonable time" ordinarily is a question of fact for determination by a jury. *Id.*

353. TEX. PROP. CODE ANN. § 27.004(k) (Vernon Supp. 1990).

354. *Id.* § 27.004(1).

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corresponding subsection 27.004(a).[355]

Lastly, section 27.005 expressly rejects any possibility that chapter 27 creates an implied warranty or extends limitations periods. Section 27.005 provides:

> *This Chapter does not create an implied warranty or extend a limitations period.*[356]

This provision was added to assure that chapter 27 and its various provisions allowing for repair would not be construed to create any implied warranties that do not otherwise exist in common law or by other statutes. Because chapter 27 does not create a cause of action, there was no need to include a limitations provision in this chapter. This subsection clarifies that chapter 27 does not create any different limitations period or accrual of cause of action for the purpose of lengthening a limitations period.

D. *Effective and Implementation Dates of the New Residential Construction Liability Law*

Chapter 27 was passed by the 71st Legislature on May 29, 1989, and signed by Governor Clements on June 15, 1989. Its effective date was September 1, 1989, and it applies to claims for which a suit was filed on or after that date.[357]

355. *See supra* notes 305-10.

356. TEX. PROP. CODE ANN. § 27.005 (Vernon Supp. 1990).

357. Act of June 14, 1989, ch. 1072, 1989 Tex. Sess. Law Serv. 4338 (Vernon)(codified at TEX. PROP. CODE ANN. §§ 27.001-.005 (Vernon Supp. 1990)).

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APPENDIX I

SAMPLE FORM FOR DTPA WAIVER IN $500,000-PLUS CONTRACT FOR GOODS/SERVICES (OTHER THAN CONSUMER'S HOME)

The following form provisions are generic in nature and comply with the prerequisites in DTPA section 17.42(a)(1)-(3) for a valid and enforceable DTPA waiver, provided that:

(a) the goods or services sought or acquired under the contract are other than a family residence for the consumer;
(b) the consideration paid or to be paid exceeds $500,000;
(c) the consumer is represented by legal counsel in seeking or acquiring the goods or services; and
(d) the consumer is not in a significantly disparate bargaining position.

To be inserted in the contract:

DTPA WAIVER PROVISION.

Pursuant to section 17.42(a)(1)-(3) of the Texas Business and Commerce Code, [*consumer*] waives all provisions of subchapter E of chapter 17 of that code [*if applicable,*[358] *add*: other than section 17.555] with respect to this contract and all goods [if applicable: services] purchased [*if applicable, substitute or add*: leased] under this contract.

To follow the signatures at the end of the contract:

DTPA WAIVER SIGNATURES

Pursuant to section 17.42(a)(1)-(3) of the Texas Business and Commerce Code, [*consumer*] and [*as applicable*: his or her or its or their] undersigned legal counsel sign this contract with respect to the waiver provision contained in [*insert applicable section, paragraph, etc. number*] of the foregoing contract.

358. TEX. BUS. & COM. CODE ANN. § 17.555 (Vernon 1987)(relating to indemnity and contribution).

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____

[signature of consumer]

____

[signature of consumer's legal counsel]

When appropriate one or more of the following may be negotiated by the seller/provider into the contract as part of the DTPA waiver provision:

> In order to induce *[seller/provider]* to enter into this contract [consumer] represents and warrants:
>
> ( ) The consideration paid or to be paid by *[consumer]* to *[seller/provider]* for the goods *[if applicable, substitute or add*: services] purchased *[if applicable, substitute or add*: leased] under this contract [is *insert the applicable dollar amount or if applicable substitute*: exceeds $500,000].
>
> ( ) *[Consumer]* acknowledges that *[seller/provider]* would not enter into this contract *[or if applicable add either*: for the same consideration *or* upon the same terms] but for inclusion of this waiver provision in this contract.
>
> ( ) *[Consumer]* has a choice other than to enter into this contract with the waiver provision contained in *[insert applicable section, paragraph, etc. number]* in that *[as applicable*: he *or* she *or* it *or* they] can *[describe alternative choice]*.
>
> ( ) *[Consumer]* does not consider *[as applicable*: himself *or* herself *or* itself *or* themselves] to be in a significantly disparate bargaining position relative to *[seller/provider]* with respect to this contract.
>
> ( ) The effect of this waiver provision has been explained to *[consumer]* by *[as applicable*: his *or* her *or* its *or* their] own legal counsel.
>
> ( ) No statement or representation by *[seller/provider]* or any attorney or other representative acting on *[as applicable*: his *or* her *or* its *or* their] behalf has influenced or induced *[consumer]* to agree to this waiver provision.
>
> ( ) *[Consumer]* is voluntarily agreeing to this waiver provision and considers it to be binding and enforceable.

APPENDIX II

SAMPLE CHARGE FOR RESIDENTIAL CONSTRUCTION DEFECT CASE SUBMITTED UNDER NEW CHAPTER 27 OF THE PROPERTY CODE

The authors of this article suggest the definitions, instructions and questions in this appendix serve as an example for jury submissions in residential construction defect cases, which are governed by chapter 27[359] of the Property Code and brought under the DTPA.[360] These questions, definitions, and instructions illustrate how the application of various provisions of chapter 27 will vary from the standard form of submission in DTPA cases that do not involve residential construction defects.[361]

DEFINITIONS/INSTRUCTIONS

"Claimants" refer to Hugh and Hope Homeowner.[362]

"Defendant" refers to Carl Contractor.[363]

"Construction defect" refers to the matter which gives rise to claimants' complaint.[364]

"Knowingly" means actual awareness of the defect or deficiency "constituting the breach of warranty, but actual awareness may be inferred when objective manifestations indicate that a person acted with actual awareness."[365]

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359. TEX. PROP. CODE ANN. §§ 27.001-.005 (Vernon Supp. 1990).

360. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1990).

361. *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 427 n.8 (Tex. 1984)(suggesting general form for jury charge).

362. TEX. PROP. CODE ANN. § 27.004 (Vernon Supp. 1990). "Claimant" is the term of art used in chapter 27 to describe the plaintiff or complaining party. *Id.* This also is consistent with new terminology adopted under the 1987 tort reforms where "claimant" is substituted for "plaintiff, counter-claimant, cross-claimant, or third party plaintiff seeking recovery of damages." TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(1) (Vernon Supp. 1990); *see also* Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System - Part 2*, 25 HOUS. L. REV. 245, 269-71 (1988).

363. This term refers to the contractor. *See supra* Section IV, notes 266-69 and accompanying text.

364. TEX. PROP. CODE ANN. § 27.001(2) (Vernon Supp. 1990). For a discussion of the definition of *construction defect*, see *supra* Section IV, notes 258-65 and accompanying text.

365. TEX. BUS. & COM. CODE ANN. § 17.45(9) (Vernon 1987). Section 17.45(a) of the Business and Commerce Code provides:

> "Knowingly" means actual awareness . . . of the act or practice [constituting] . . . the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

" 'Negligence' means failure to use ordinary care, that is, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances."[366]

" 'Ordinary care' means that degree of care which will be used by a person of ordinary prudence under the same or similar circumstances."[367]

" 'Producing cause' means an efficient, exciting, or contributing cause which, in a natural sequence, produced the occurrence. There can be more than one producing cause."[368]

" 'Proximate cause' means that cause which, in a natural and continuous sequence, produces the [the damage], and without which cause such [damage] would not have occurred. In order to be a proximate cause, the act or omission [or construction defect] complained of must be such that a person using *ordinary care* would have foreseen that the [damage] or some similar [damage] might reasonably result therefrom. There may be more than one proximate cause of [damage]."[369]

"Goods" means tangible property which is moveable and not af-

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The authors of this article submit that the DTPA statutory definition of "knowingly" as it applies to breach of warranty actions is flawed and inappropriate. The definition of "knowingly" used in this sample charge, corrects the flaw by requiring that the defendant have actual knowledge of the *defect* or *deficiency* rather than the *act* or *practice* constituting the breach. A breach of warranty is rarely, if ever, an "act or practice." Rather, breach of warranty if normally characterized as a defect. Under the new residential construction liability law, breach of warranty is characterized as a construction defect. *See supra* Section IV, notes 259-66 and accompanying text (discussion of construction defect); *see also* Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 444 (Tex. 1989)(holding plaintiff must prove "goods were defective at the time they left the manufacturer's or seller's possession" in order to recover for breach of implied warranty of merchantability); March v. Thiery, 729 S.W.2d 889, 894 (Tex. Civ. App.—Corpus Christi 1987, no writ)(case alleging breach of implied warranty where court held house was constructed in good and workmanlike manner and was suitable for habitation). The court in *Thiery* held: "Under the facts of this case, "knowingly" means *actual awareness of the defects int he construction of the house*. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." *Thiery*, 729 S.W.2d at 894 (emphasis added); *see also* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 10.18 (2d ed. 1983 & Supp. 1989)(form for jury charge).

366. 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 2.01 (1987).

367. *Id.*

368. 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 70.01 (1982).

369. 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 2.04 (1987). This definition of proximate cause has been modified from the form provided in PJC 2.04 to correspond with the chapter 27 application of proximate cause as the casual nexus to damages

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fixed to the residence.[370]

QUESTIONS

QUESTION 1

Was a failure, if any, of *defendant* to construct the *fireplace* in a good and workmanlike manner:[371]

A. A producing cause of actual damages, if any, to *claimants*?[372]

Answer "Yes" or "No."

Answer: __________

B. A proximate cause of physical damage, if any, to the residence?[373]

Answer "Yes" or "No."

Answer: __________

If you have answered Question No. 1A or 1B "Yes," then answer Questions No. 2, 3, 4, and 5; otherwise, do not answer Questions No. 2, 3, 4, and 5.

In answering Questions No. 2, 3, 4, and 5, do not consider any damage to goods.[374]

QUESTION 2

Was the negligence of *claimants*, if any, a proximate cause of their

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rather than to an event or occurrence. *See* TEX. PROP. CODE ANN. §§ 27.001-.005 (Vernon Supp. 1990); *see also supra* Section IV, note 296 (discussing proximate cause distinction).

370. *See* TEX. PROP. CODE ANN. § 27.002 (Vernon Supp. 1990). For a discussion of "goods," see *supra* Section IV, notes 285-89 and accompanying text.

371. Humber v. Morton, 426 S.W.2d 544, 555 (Tex. 1968); *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon Supp. 1990).

372. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1)(A) (Vernon Supp. 1990). This broad form type submission will include all types and measures of damages recoverable under the DTPA actual damages/producing cause standard, except physical damage to the residence, which is subject to the new chapter 27 "proximate cause" standard. *Id.*

373. TEX. PROP. CODE ANN. § 27.001(2) (Vernon Supp. 1990). Physical damage to the residence or any appurtenance is recoverable only if it is proximately caused by a construction defect. *Id.*; *see also supra* Section IV, notes 258-65; TEX. PROP. CODE ANN. § 27.001(2) (discussing construction defect).

374. TEX. PROP. CODE ANN. § 27.002 (Vernon Supp. 1990). This instruction is necessary since damage to goods is not subject to any defense or defensive matter applicable under section 27.003. For a general discussion of goods, see *infra* notes 58-71.

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damages?[375]

Answer "Yes" or "No."

Answer: __________

QUESTION 3

Was the failure of *claimants*, if any, to take reasonable action to mitigate damages, a proximate cause of their damages?[376]

Answer "Yes" or "No."

Answer: __________

QUESTION 4

Was normal wear, tear, or deterioration a producing cause of damages, if any, to *claimants*?[377]

Answer "Yes" or "No."

Answer: __________

QUESTION 5

Was normal shrinkage due to drying or settlement of construction components a producing cause of damages, if any, to *claimants*?[378]

You are instructed that to be "normal," shrinkage must be within the tolerance of building standards.[379]

Answer "Yes" or "No."

Answer: __________

If, in answer to Questions No. 1, 2, 3, 4, and 5, you have found that more than one party's acts or omissions, or that other conditions contributed to cause claimants' damages, and only in that event, then answer Question No. 6.

In answering Question No. 6, you are instructed that the percentage of causation attributable to a party or condition is not necessarily

375. *Id.* § 27.003(a)(1); *see also supra* Section IV, notes 295-96.

376. TEX. PROP. CODE ANN. § 27.003(a)(2) (Vernon Supp. 1990).

377. TEX. PROP. CODE ANN. § 27.003(a)(3) (Vernon Supp. 1990).

378. *See supra* note 300.

379. This instruction is suggested to simplify the submission of all elements of this defensive issue.

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measured by the number of acts, omissions, or conditions found. The percentages you find in answering Question No. 6 must total 100 percent.[380]

QUESTION 6

Find the percentage of damages caused by:[381]

A.	*Defendant's* failure to construct the fireplace in a good and workmanlike manner.	___%
B.	*Claimants'* negligence.	___%
C.	*Claimants'* failure to take reasonable action to mitigate damages.	___%
D.	Normal wear and tear.	___%
E.	Normal shrinkage.	___%
	TOTAL:	100%

If you have answered Question No. 1A or 1B "Yes," then answer Question No. 7; otherwise, do not answer Question No. 7.

QUESTION 7

Did *defendant* commit knowingly the conduct found by you in your answer to Questions No. 1A or 1B?

Answer "Yes" or "No."

Answer: __________

If you have answered Question No. 1A "Yes," then answer Question No. 8; otherwise, do not answer Question No. 8.

QUESTION 8

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *claimants* for their damages, if any, that you

380. The method of apportionment of causation required under section 27.003 is similar to the concepts of comparative causation adopted in *Duncan v. Cessna*. 665 S.W.2d 414, 427 (Tex. 1984). *Comparative causation* is applied rather than the tort reform concept of *comparative responsibility* because chapter 27 provides as defensive matters or conditions of ordinary wear and tear and normal shrinkage which are not necessarily attributable to a party, but rather to natural processes.

381. The question regarding apportionment is conditioned upon a finding of one or more of the questions on defensive matters which are submitted in accordance with section 27.003 of the Texas Property Code Annotated.

found in your answer to Question No. 1A?[382]

Consider the following elements of damages and no others.

Answer in dollars and cents, if any.

A. The reasonable and necessary costs to repair the *fireplace*.[383]

Answer: $________

B. The reasonable and necessary costs to repair goods.[384]

Answer: $________

C. Mental anguish.[385]

Answer: $________

If you have answered Question No. 1B "Yes," then answer Question No. 9; otherwise, do not answer Question No. 9.

QUESTION 9

What sum of money, if any, if paid now in cash would fairly and reasonably compensate *claimants* for their damages, if any, that you found in answer to Question 1B.

Consider only the following elements and none other.

Answer in dollars and cents, if any.

The reasonable and necessary costs to repair the damage to the

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382. This conditioning instruction confines the consideration of "actual damage" questions to conduct which is a "producing cause" of actual damages to plaintiff. A separate finding is necessary to exclude damage to goods from apportionment of damages since damage to goods is excepted from applicability under chapter 27 and is not subject to apportionment under section 27.003.

383. This is the reasonable and necessary cost to repair the primary construction defect. *See supra* Section IV, Hypothetical #1 and note 264 for discussion of "primary construction defect."

384. This represents the reasonable and necessary cost to repair the goods. This is submitted separately because damage to goods is not subject to any offset for comparative causation found in connection with one of the defenses or defensive matters.

385. Damages for mental anguish may only be recovered under the DTPA if the conduct complained of is found to have been committed knowingly. Luna v. North Star Dodges Sales, Inc., 667 S.W.2d 115, 117 (Tex. 1984); *see also* Duncan v. Luke Johnson Ford, 603 S.W.2d 777, 779 (Tex. 1980); R. ALDERMAN, TEXAS DECEPTIVE TRADE PRACTICES § 4(D) at 228, 229 (1988).

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residence.[386]

In answering Question 9, do not include in your answer the cost to repair the *fireplace,* if any, found by you in your answer to Question 8A.

Answer: $________

If you have answered Question No. 1A or 1B "Yes," then answer Question No. 10; otherwise, do not answer Question No. 10.

QUESTION 10

Did *claimants* unreasonably reject *defendant's* offer to repair the construction defect and physical damages to the residence or unreasonably not permit the *contractor* to perform the repair?[387]

Answer "Yes" or "No."

Answer: ________

QUESTION 11

[Use appropriate instructions/definitions and questions for DTPA "additional" damages and attorney's fees.]

386. This damage question corresponds with Question 1B regarding structural damage to the residence *proximately caused* by the construction defect. *See supra* Section IV, note 263.

387. This question submits the reasonableness of plaintiff's rejection of defendant's offer to repair as provided under section 27.004(d). TEX. PROP. CODE ANN. § 27.004(d) (Vernon Supp. 1990).

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