St. Mary's Law Journal

Volume 21 | Number 3 Article 4

1-1-1990

Personal Injury Actions under the DTPA.

Paul N. Gold

George (Tex) Quesada

PERSONAL INJURY ACTIONS UNDER THE DTPA

PAUL N. GOLD*
GEORGE (TEX) QUESADA**

This paper discusses personal injury litigation under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA).[1] Special

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* Attorney at Law, The Law Offices of Frank L. Branson, P.C. Dallas, Texas; J.D. Southern Methodist University 1977.

** Attorney at Law, The Law Offices of Frank L. Branson, P.C. Dallas, Texas; J.D. Baylor University 1986.

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.565 (Vernon 1987 & Supp. 1990). Portions of this paper were originally presented in Gold and Quesada, *Personal Injury and Survival Actions Under The DTPA*, in STATE BAR OF TEXAS, ADVANCED DTPA-CONSUMER LAW COURSE D-1 (1989); *see also* D. BRAGG, P. MAXWELL, & J. LONGLEY, TEXAS CONSUMER LITIGATION (2.Ed. 1983); Jacks, *Personal Injury Damages and Deceptive Trade Practices Cases*, 21 TEXAS TRIAL LAWYERS FORUM, July-Sept. 1982; Mitchell, *The Deceptive Trade Practices Act—1988-89*, presented to Texas Association of Defense Council Fall Meeting, 1989.

emphasis is placed on wrongful death and survival actions.

I. COVERAGE

The starting point for any discussion of causes of action under the DTPA is determining which version of the Act applies, who may be parties to the lawsuit, and what damages are recoverable. This section focuses on effective dates, proper parties, and recoverable damages.

A. *Effective Dates*

The DTPA has undergone a number of revisions since its inception in 1973. Major changes were made in 1979 and 1989.[2] The version in effect at the time of the actual conduct giving rise to the lawsuit governs which Act applies.[3] Regardless of the text of the statute in effect when the cause of action matures or suit is filed, one must determine the appropriate version of the Act in effect when the unlawful conduct occurred.[4] Exemptions and exceptions to the statute,[5] elements of causes of action,[6] defenses to claims,[7] and damages recoverable[8] depend upon the date the unlawful activity occurred.

A prime example is *Litton Industrial Products Inc. v. Gammage*, which involved personal injuries suffered by a worker as a result of using a ratchet adapter.[9] Ernest Gammage was employed as a

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2. There have been major revisions by each legislative session. *See* Deceptive Trade Practice-Consumer Protection Act, ch. 61, §§ 1-3, 1975 Tex. Gen. Laws 149; Deceptive Trade Practice-Consumer Protection Act, ch. 216, §§ 1-14, 1977 Tex. Gen. Laws 600; Deceptive Trade Practice-Consumer Protection Act, ch. 603, §§ 1-10, 1979 Tex. Gen. Laws 1327; Deceptive Trade Practice-Consumer Protection Act, ch. 307, §§ 1-3, 1981 Tex. Gen. Laws 863; Deceptive Trade Practice-Consumer Protection Act, ch. 883, §§ 1-5, 1983 Tex. Gen. Laws 4943; Act of June 12, 1985, ch. 564, §§ 1-2, 1985 Tex. Gen. Laws 2165; Act of June 11, 1987, ch. 280, §§ 1-3, 1987 Tex. Gen. Laws 1641; Act of June 14, 1989, ch. 380 §§ 1-8, 1989 Tex. Sess. Law. Serv. 1490 (Vernon).

3. Woods v. Littleton, 554 S.W.2d 662, 666 (Tex. 1977).

4. *Id.*

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

6. Mahan Volkswagen, Inc. v. Hall, 648 S.W.2d 324, 334 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

7. *See* Riojas v. Lone Star Gas Co., 637 S.W.2d 956, 959 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.)(appropriate standard of causation arises under statute in effect when case arose).

8. *See* Williams v. 3 Beal Bros. 3, Inc., 628 S.W.2d 531, 531 (Tex. App.—Beaumont 1982, writ ref'd n.r.e.)(damages calculated under statute in effect when acts complained of occurred).

9. 668 S.W.3d 319 (Tex. 1984).

mechanic and was using a ratchet designed by Litton Industrial Products when the ratchet failed and Mr. Gammage fell backwards and sustained serious injuries.[10] At trial, the injured worker prevailed against the manufacturer on DTPA theories of recovery.[11] The jury awarded more than $700,000 in actual damages and the trial court rendered a judgment trebling those damages under the DTPA.[12] The manufacturer appealed and argued against treble damages because the sale of the tool occurred before May 21, 1973, the effective date of the Act.[13] The Texas Supreme Court reversed the trial court judgment,[14] holding that Gammage had the burden of proving that the defendant committed an act or practice after the effective date of the DTPA.[15] Since Gammage failed to obtain a jury finding that Litton's actionable conduct occurred after the Act's effective date, he was not entitled to DTPA damages.[16]

The analysis involved is completely different from the typical statute of limitations analysis. The focus is on the date that the deceptive acts or practices occurred and not the date that the sale or transaction occurred.[17] It is very possible for a consumer to pursue a DTPA-based suit for predatory acts which occurred years before the goods or services were acquired and years before the actual injury. The plaintiff's claim does not mature until the date of injury, but a lawsuit may be brought for acts or practices which predated the injury.

B. *Proper Parties*

Inherent to any discussion of a cause of action under the DTPA is the consideration of who qualifies as a "consumer." By its plain wording, the statute provides a remedy only to those who seek to acquire goods or services.[18] The DTPA's definition of a consumer is:

> [A]n individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any

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10. *Id.* at 321.
11. *Id.*
12. *Id.*
13. *Id.*
14. Litton Indus. Prods. v. Gammage, 668 S.W.2d 319, 324 (1984).
15. *Id.*
16. *Id.*
17. For instance, in *Woods v. Littleton*, the sale occurred before the effective date of the statute, but the deceptive practices post-dated the statute. 544 S.W.2d 662, 666 (Tex. 1977).
18. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987).

> goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.[19]

The wording of the statute is not the final word on the topic. A key factor is the relationship between the plaintiff and the transaction.[20] In this context, the practitioner should consider two types of privity.

Vertical privity is clearly not required. Vertical privity "includes all parties in the distribution chain from the initial supplier of the product to the ultimate purchaser."[21] As evidenced by *Cameron v. Terrell & Garrett, Inc.*,[22] and *Stagner v. Friendswood Development Co.*,[23] a direct link between seller and purchaser is not necessary. An injured party may maintain a DTPA lawsuit against any or all parties in the chain of distribution.[24]

In *Cameron*, the consumer sued because of a defect in a home which he purchased.[25] Instead of just suing the seller of the dwelling, Mr. Cameron named the real estate broker as defendant because the broker allegedly misrepresented the square footage of the house.[26] Upholding the trial court's treble damage award, the Texas Supreme Court declared that an injured consumer may maintain suit against any person involved in transactions giving rise to DTPA claims.[27] Privity of contract was not required.

The *Stagner* case also involved a series of real estate transactions.[28] Here, the homeowners sued the developers of their subdivision even though the home sites in question were purchased from individual home builders.[29] The court of appeals upheld the summary judgment on the grounds that the homeowners were not consumers and were not in privity with the developers.[30] The supreme court affirmed the judgment because the applicable version of the Act excluded real es-

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19. *Id.* § 17.45(4).
20. Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983).
21. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 463 (Tex. 1980).
22. 618 S.W.2d 535 (Tex. 1981).
23. 620 S.W.2d 103 (Tex. 1981).
24. *Stagner*, 620 S.W.2d at 103; *Cameron*, 618 S.W.2d at 541.
25. *Cameron*, 618 S.W.2d at 537.
26. *Id.*
27. Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540-41 (Tex. 1982).
28. Stagner v. Friendswood Dev. Co., 620 S.W.2d 103, 103 (Tex. 1981).
29. Stagner v. Friendswood Dev. Co., 613 S.W.2d 793, 794 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e per curiam*, 620 S.W.2d 103 (Tex. 1981).
30. *Stagner*, 613 S.W.2d at 794-95.

tate transactions.[31] In affirming the court of appeals, the supreme court issued a *per curiam* opinion disapproving the lower court's holding that privity was required.[32]

The issue of horizontal privity is not as clear. Unlike chain of title privity, horizontal privity involves the derivative relationship between the purchaser and the injured party. The term horizontal privity "describes the relationship between the original supplier and any non-purchasing party who uses or is affected by the product."[33] For example, a worker injured by a defective product purchased by his or her employer obviously lacks any direct contact with the seller but nevertheless may be a consumer under the DTPA.[34]

In analogous UCC warranty and product liability cases, horizontal privity creates standing for injured parties to bring suit. In *Garcia v. Texas Instruments, Inc.*,[35] the court allowed an injured worker to bring a claim for personal injuries occasioned by breach of the UCC implied warranty of merchantability.[36] An injured employee can recover even though his or her employer actually purchased the offending product.[37]

In its decision in *Darryl v. Ford Motor Co.*,[38] the court resolved the issue in products liability cases,[39] holding that bystanders have causes of action for injuries caused by defective products.[40] In both cases, the injured parties were entitled to relief even though they lacked direct conduct with the product sellers.

Two Texas Supreme Court cases deal with horizontal privity in the DTPA context. The first clear statement that derivative lawsuits were allowed, came in *Kennedy v. Sale*.[41] In the *Kennedy* case, an employee brought suit against her medical insurance agent for unpaid

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31. *Stagner*, 620 S.W.2d at 103.

32. *Id.*

33. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 463-64 (Tex. 1980).

34. *See* Litton Indus. Prods. v. Gammage, 668 S.W.2d 319, 321 (Tex. 1984)(injured worker brought suit under DTPA).

35. 610 S.W.2d 456 (Tex. 1980).

36. *Id.* at 463.

37. *See* Muncy v. Magnolia Chem. Co., 437 S.W.2d 15, 16-17 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.)(court allowed employee action).

38. 440 S.W.2d 630 (Tex. 1969).

39. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

40. *Darryl*, 440 S.W.2d at 633.

41. 689 S.W.2d 890 (Tex. 1985).

medical bills.[42] The agent defended on the grounds that the worker was not a consumer because she neither sought nor purchased the group health coverage from the agent.[43] Instead, the worker's employer negotiated with the agent and paid the premiums for the policy.[44] The supreme court rejected such a strict reading of the statute and held that indirect purchasers were entitled to bring suit.[45] Relying on a previous holding, the court stated:

> Privity between the plaintiff and defendant is not a consideration in deciding the plaintiff's status as a consumer under the DTPA . . . . A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint.[46]

Therefore, a direct relationship between the plaintiff and the entity providing the goods or services was not required.

This holding was strengthened in the personal injury context by *Birchfield v. Texarkana Memorial Hospital*.[47] In *Birchfield*, a child injured by medical negligence was allowed to bring a DTPA suit for misrepresentations made to her parents.[48] The child did not actively seek the hospital's goods or services; her parents sought those items from the defendant.[49] Nevertheless, the child was a consumer of those goods and services from the hospital because of her relationship to the transaction between her parents and the health care provider.[50]

At least one court has attempted to limit this liberal interpretation in the commercial context. *Home Savings Association v. Guerra*, narrowed the statute's reach to protect "innocent creditors"[51] when the court stated:

> Although a consumer suing under the DTPA need not establish contractual privity with the defendant, he must show that the defendant has committed a deceptive act which is the producing cause of the con-

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42. *Id.* at 891.
43. *Id.*
44. *Id.*
45. *Id.* at 892.
46. Kennedy v. Sale, 689 S.W.2d 890, 892-93 (Tex. 1985)(quoting Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1985)).
47. 747 S.W.2d 361 (Tex. 1987).
48. *Id.* at 364.
49. *Id.* at 368.
50. *Id.*
51. 733 S.W.2d 134, 136 (Tex. 1987).

> sumer's damages. The DTPA does not attach derivative liability to a defendant based on an innocent involvement in a business transaction.[52]

The *Guerra* case distinguished other Texas Supreme Court privity cases by noting that the prior defendants had been so "inextricably intertwined" in the transaction "as to be equally responsible for the conduct of the sale."[53] This language flowed from an earlier supreme court opinion[54] and could have been read as imposing another element on the plaintiff's cause of action. Any thought that this constriction forced the consumer to show that the defendant is "inextricably intertwined" with the transaction is dispelled by the decision in *Qantel Business Systems, Inc. v. Customs Control Co.*[55] That case explained that the "inextricably intertwined" analysis is not a new element of the plaintiff's cause of action but goes to the consumer's standing to bring suit.[56] Thus, all common law theories of vicarious liability still apply to extend the reach of the DTPA to aggrieved consumers.[57] In the personal injury context, traditional doctrines such as agency and respondeat superior will also provide adequate bases for including a defendant within the statute's parameters.

C. *Excluded Defendants*

The DTPA allows suit against any person who injures a consumer by committing a prohibited act.[58] The term "person" is defined as "an individual, partnership, corporation, association, or other group, however, organized."[59]

The statute's broad reach is somewhat limited as several groups are at least partially excluded from the legislation's ambit. Veterinarians, for instance, are not subject to DTPA claims for malpractice or negligence.[60] More significantly, health care providers and physicians en-

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52. *Id.* (citations omitted).
53. *Id.* (quoting Knight v. International Harvester Corp., 627 S.W.2d 382, 389 (Tex. 1982)).
54. *Knight*, 627 S.W.2d at 389 (Tex. 1982).
55. 761 S.W.2d 302 (Tex. 1988).
56. *Id.* at 305.
57. *Id.*
58. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1987 & Supp. 1990).
59. *Id.* § 17.45(3).
60. TEX. REV. CIV. STAT. ANN. art. 7465a, § 18c (Vernon Supp. 1990).

joy immunity from DTPA suits alleging personal injury liability for negligence.[61] This exclusion applies to the employees of health care providers acting within the scope of their employment.[62] The statute, however, does not exempt doctors and health care providers from allegations of other prohibited conduct. Claims based upon misrepresentations, unconscionable acts, and breach of warranties are not precluded.[63] Since DTPA claims are based primarily upon statutory violations instead of negligence, doctors and hospitals are still subject to suits under the statute. The bottom line to physician/health care liability under the DTPA should be that if the DTPA has been violated, liability should lie, unless it is clear that the sole producing cause of the patient's injuries was the negligence of the defendant.[64] A good example of this is *Birchfield v. Texarkana Memorial Hospital*,[65] where liability was at least partially predicated upon various misrepresentations by the hospital concerning the quality of care rendered.[66]

D. *Personal Injuries*

Despite earlier predictions to the contrary, personal injury damages are recoverable under the DTPA. A consumer is entitled to recover all actual damages caused by the unlawful conduct.[67] Consistent with the act's liberal interpretation, a plaintiff can also recover all common-law damages.[68]

A plethora of court decisions authorize recovery of virtually every category of personal injury damages. Case law entitles injured consumers to recover lost earning capacity,[69] the cost of medical treat-

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61. *Id.* art. 4590i, § 12.01(a).

62. Quinn v. Memorial Medical Center, 764 S.W.2d 915, 918 (Tex. App.—Corpus Christi 1989, no writ); *see also* Esterly v. HSP of Texas, Inc., 772 S.W.2d 211, 214 (Tex. App.—Dallas 1989, no writ)(exclusion covers products intimately connected with health care provision).

63. D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 202 (1983); Alderman, *The Texas Deceptive Trade Practices Act Meets the Medical Malpractice Act*, 14 CAVEAT VENDOR 34 (1989).

64. Alderman, *The Texas Deceptive Trade Practices Act Meets the Medical Malpractice Act*, 14 CAVEAT VENDOR 34 (1989).

65. 747 S.W.2d 361 (Tex. 1987).

66. *Id.* at 364.

67. TEX. BUS. & COM. CODE ANN. § 17.50(a)-(b) (Vernon 1987 & Supp. 1990).

68. *See* Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 921 (Tex. App.—Waco 1985, writ dism'd)(damages permitted if evidence shows violation occurred causing damage).

69. *See* Keller Indus., Inc. v. Reeves, 656 S.W.2d 221, 226 (Tex. App.—Austin 1983, writ ref'd n.r.e.)(evidence supported jury's award for future earning capacity).

ment,[70] physical pain and suffering,[71] and property damage.[72] Recovery for mental anguish is also allowed,[73] and it appears that the physical injury requirement for mental anguish damages has been abolished.[74]

A plaintiff may recover treble damages under the DTPA upon a showing that the defendant's conduct was undertaken "knowingly."[75] The term is defined as "actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim."[76] A plaintiff may not twice recover damages for the same act or practice.[77] In the punitive damages context, the statute will not allow exemplary and statutory treble damages in the absence of separate and distinct findings of actual damages on both the act of negligence and the deceptive acts or practices.[78]

II. CAUSATION

Under the DTPA, a consumer may maintain a cause of action for deceptive acts which are a producing cause of actual damages.[79] This is completely different from the proximate cause standard required in common law personal injury actions.[80] The DTPA cause of action

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70. *See id.* at 226-27 (plaintiff award for medical care); *see also* Tom Benson Chevrolet, Inc. v. Alvarado, 636 S.W.2d 815, 818-19 n.3 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)(medical care).

71. *See* Hurst v. Sears, Roebuck & Co., 647 S.W.2d 249, 250 (Tex. 1983)(plaintiff awarded damages for physical pain and suffering).

72. *See Alvarado*, 636 S.W.2d at 823 (plaintiff allowed to testify as to value of car).

73. *See e.g.* Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 368 (Tex. 1987)(mental anguish damages); Brown v. American Transfer and Storage Co., 601 S.W.2d 931, 939 (Tex. 1980)(evidence did not support finding of mental anguish); Centroplex Ford, Inc. v. Kirby, 736 S.W.2d 261, 264 (Tex. App.—Austin 1987, no writ)(DTPA allows mental anguish damages).

74. *See* St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 650 (Tex. 1987)(defendant's negligence and deceptive act caused some damages). Justice Spears observes in his dissent that the majority opinion overruled *Brown v. American Transfer and Storage Co.* to the extent that *Brown* imposed a physical injury requirement for mental anguish damages in a DTPA action. *Id.* at 654 (Spears, J., dissenting).

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

76. *Id.* § 17.45(9).

77. Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 367 (Tex. 1987)(DTPA precludes recovery of penalties under both DTPA and another law for damages resulting from same act).

78. Mayo v. John Hancock Mut. Life Ins. Co., 711 S.W.2d 5, 6-7 (Tex. 1986).

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

80. *See* Nixon v. Mr. Property Management Corp., 690 S.W.2d 546, 549 (Tex. 1985)(proximate cause requires showing of cause in fact and foreseeability).

does not require foreseeability. The only question is whether the consumer's injuries would have occurred but for the defendant's conduct.[81] The test in DTPA cases should be straightforward because "[c]ause in fact means that the . . . act at issue was a substantial factor in producing the injury, and without which such [conduct], no harm would have resulted."[82] Nevertheless, the plaintiff must demonstrate that the deceptive act or practice was a producing cause of injury.[83]

III. SURVIVAL ACTIONS

A. *Generally*

When a plaintiff dies following injuries to his or her health, reputation or person, the cause of action "survives" to the estate and may be prosecuted by the heirs or legal representatives.[84] Damages for all of the losses incurred by the decedent prior to death are recoverable. The survival action should be distinguished from the wrongful death claim in which the decedent's statutory beneficiaries can bring suit for their own losses.[85] A split of authority exists in Texas as to whether DTPA cases "survive" to the benefit of the heirs and representatives.

B. *No Survival in San Antonio*

In *First National Bank of Kerrville v. Hackworth*, the court held that a cause of action under the DTPA did not survive to the estate of an injured party.[86] The claim involved allegations against the Kerrville Bank for wrongful payment of questionable checks.[87] Suit was filed claiming violations of the DTPA, but the bank customer died before trial.[88] The depositor's estate was substituted as plaintiff and judgment was rendered in its favor.[89]

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81. *See* McKnight v. Hill & Hill Exterminators, Inc., 689 S.W.2d 206, 209 (Tex. 1985)(evidence should show damages caused by defendant's conduct); *Nixon*, 690 S.W.2d at 549-51 (harm would not have occurred without defendant's conduct).

82. Brown v. Edwards Transfer Co., 764 S.W.2d 220, 223 (Tex. 1988).

83. *See* MacDonald v. Texaco, Inc., 713 S.W.2d 203, 205 (Tex. App.—Corpus Christi 1986, no writ)(plaintiff must prove deceptive act or practice was producing cause of injury). The plaintiff failed to prove that he stopped at the Texaco station because of the motto, "You can trust your car to the man who wears the star." *Id.*

84. TEX. CIV. PRAC. & REM. CODE ANN. § 71.021(b) (Vernon 1986).

85. *Id.* § 71.001.

86. 673 S.W.2d 218, 221 (Tex. App.—San Antonio 1984, no writ).

87. *Id.* at 220.

88. *Id.*

89. *Id.*

On appeal, the bank argued that the depositor's DTPA cause of action did not survive her death.[90] A divided San Antonio court of appeals agreed.[91] Noting that the common law did not allow "personal rights" to transcend a plaintiff's demise, the majority concluded that death extinguishes DTPA actions.[92] Reasoning that the DTPA is primarily a punitive statute, the court relied upon several cases holding that punitive damage actions do not survive to benefit the estate.[93] Additionally, the court held that the estate and its representatives were not "consumers" and thus were not entitled to a DTPA judgment.[94]

A three-judge dissent would have allowed survival of the cause of action on the theory that the DTPA is not a punitive statute but is instead remedial.[95] As such, the common law would have allowed the survival action.[96] Thus, the dissent would have reached the "consumer" question and held that the estate was a party protected by the statute.[97]

C. *Survival in Fort Worth and Houston*

Thomes v. Porter[98] and *Mahan Volkswagen, Inc. v. Hall*[99] differ sharply from the San Antonio court of appeals' holding. *Thomes* involved defects in the construction of a home.[100] Before suit was filed, the homeowner passed away but the claim was pressed by the executrix of the estate.[101] Judgment was rendered in the estate's favor and on appeal the issue was whether the estate had the right to bring DTPA claims.[102] Noting that the legislation itself did not provide for survival of the causes of action, the Fort Worth court of appeals

90. First Nat'l Bank of Kerrville v. Hackworth, 673 S.W.2d 218, 220 (Tex. App.—San Antonio 1984, no writ).

91. *Id.* at 218, 224.

92. *Id.* at 220-21.

93. *Id.* (citing Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980)).

94. First Nat'l Bank of Kerrville v. Hackworth, 673 S.W.2d, 218, 221 (Tex. App.—San Antonio 1984, no writ).

95. *Id.* at 227 (Tijerina, J., dissenting).

96. *Id.* at 226-27 (common law requires survival of cause of action).

97. *Id.* The dissent believed the estate had a cause of action. *Id.*

98. 761 S.W.2d 592 (Tex. App.—Fort Worth 1988, no writ).

99. 648 S.W.2d 324 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

100. *Thomes*, 761 S.W.2d. at 593.

101. *Id.*

102. Thomes v. Porter, 761 S.W.2d 592, 593 (Tex. App.—Ft. Worth 1988, no writ)(appellant contended appellee not consumer under DTPA).

looked at the statute's liberal construction and genesis.[103] The court observed that the DTPA constitutes a vehicle for suits founded on breaches of warranty and fraud and held that the right to recover under the Act passed on to the estate.[104] This holding furthered the statutory goal of encouraging private actions against unlawful actions.[105]

The *Mahan Volkswagen* case arose when the brakes of a 1973 Hornet allegedly failed, sending the driver into a fatal collision with a utility pole.[106] The driver's family sued the manufacturer and distributor based on strict liability and the DTPA.[107] Without much fanfare, the Houston court of appeals, First District, held that the estate could bring a DTPA claim.[108] The court properly pointed out that the only cause of action which survived is the estate's claim.[109] Thus, treble damages are available only for a decedent's physical pain, mental anguish, funeral expenses, and property damage.[110]

D. *Supreme Court Action*

The Texas Supreme Court may have indicated the resolution to the split in authorities. In *Hofer v. Lavender*, the Texas Supreme Court held that claims for punitive damages survived against the beneficiary of an estate.[111] The decision distinguishes survival actions from wrongful death actions[112] and explicitly permits sanctions against an estate for the decedent's misdeeds.[113] Thus, even if one accepts the San Antonio court of appeals' reasoning that the statute is punitive and not remedial, DTPA actions should survive to benefit the injured decedent's estate.

This question exists only because the supreme court failed to act when it had the question squarely before it. *Shell Oil Co. v. Chapman* involved a situation where Shell Oil Company mistakenly sold light-

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103. *Id.* at 594.
104. *Id.*
105. *Id.*
106. Mahan Volkswagen, Inc. v. Hall, 648 S.W.2d 324, 327 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).
107. *Id.*
108. *Id.* at 333.
109. *Id.*
110. *Id.* at 332-33.
111. 679 S.W.2d 470, 475 (Tex. 1984).
112. *Id.*
113. *Id.*

weight motor oil in heavy-weight containers.[114] Bobby and Nonie Chapman, owners of several diesel trucks, purchased the mislabeled products which damaged their trucks.[115] Mr. Chapman died before suit was filed.[116] His widow filed the lawsuit and alleged violations of the DTPA.[117] Judgment was entered in favor of Mrs. Chapman, and on appeal the defendant argued that the widow could not recover under the DTPA because those damages do not survive to the estate.[118] The supreme court agreed to hear the case, but did not grant the writ of error on that point.[119] The court chose not to discuss whether the DTPA damages survived to Mr. Chapman's estate, and instead reserved opinion for another day on that aspect of the case.[120]

E. *Consumer Status*

It is important to recall that only consumers may bring a cause of action under the DTPA. This concept was underscored in *March v. Thiery*, where the children of a deceased homeowner brought warranty-based DTPA actions for defects in the house.[121] The children were not urging suit on behalf of the estate, but in their own right as heirs of their mother's estate.[122] The heirs had the right to bring common law suits for breach of warranties, but were not entitled to assert their claims for attorneys' fees under the DTPA.[123] Their ability to bring the common law warranty actions arose from their status as co-owners of the home.[124] The DTPA suit for attorneys' fees, however, was disallowed because the children were not themselves consumers.[125] Holding that the heirs had acquired the property through descent and distribution instead of purchase or lease, the court would not allow an action for attorneys' fees.[126]

The *March* case should be contrasted against the *Mahan Volks-*

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114. 682 S.W.2d 257, 258 (Tex. 1984).
115. *Id.* at 258-59.
116. *Id.* at 258.
117. *Id.*
118. *Id.* at 259.
119. S and R Oil Co. v. Chapman, 27 Tex. Sup. Ct. J. 540, 541 (Sept. 5, 1984).
120. Shell Oil Co. v. Chapman, 682 S.W.2d 257, 259 (Tex. 1984).
121. 729 S.W.2d 889, 896 (Tex. App.—Corpus Christi 1987, no writ).
122. *Id.* at 893.
123. *Id.* at 896.
124. *Id.* at 893.
125. March v. Thiery, 729 S.W.2d 889, 896 (Tex. App.—Corpus Christi 1987, no writ).
126. *Id.*

wagen case.[127] In the *Mahan* case, the court held that a decedent's consumer status allows the heirs and beneficiaries to maintain a DTPA claim on behalf of the estate.[128] Once an individual becomes a consumer under the Act, the survivors need not independently meet the test before pursuing a DTPA action.[129] Thus, a decedent's consumer status is imputed to his or her heirs and beneficiaries to the extent that they pursue the claims which would have been available had the decedent lived.[130]

IV. STRATEGIC CONSIDERATIONS

A number of considerations will arise which may affect the decision to pursue claims for personal injuries under the DTPA. This section addresses several of these concerns.

A. *Common Law Defenses*

The DTPA excludes common-law defenses. Since the DTPA is a creature of statute, any defenses must be contained in that legislation.[131] The DTPA did not incorporate common-law defenses into its statutory scheme. The Texas Supreme Court has stated that:

> 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.[132]

The DTPA does not contain defenses regularly used against personal injury claimants. Most significantly, contributory negligence is not included.[133] As a result, absent legislative recognition, common law defenses are not applicable to a DTPA cause of action.

The failure to provide adequate notice and an offer of settlement is

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127. Mahan Volkswagen, Inc., v. Hall, 648 S.W.2d 324 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e).

128. *Id.* at 333.

129. *Id.*

130. *Id.*

131. Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980).

132. *Id.*

133. Frank B. Hall & Co. v. Beach, Inc., 733 S.W.2d 251, 264 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.). *But see infra* notes 162-164 and accompanying text (common law defenses and comparative negligence apply to DTPA claims arising after September 1, 1989).

one of the only effective statutory defenses to a DTPA-based personal injury suit.[134] As a prerequisite to obtaining treble damages, an injured consumer must provide written notice of his intent to sue under the DTPA and make an offer to settle.[135] This provision seeks to increase settlements and discourage litigation.[136] Failure to give adequate notice and an offer to settle provides a defense to the consumer's claim for treble damages.[137]

B. *Special Recoveries*

Two types of recovery, typically unavailable to personal injury claimants, may lead a consumer to file a personal injury claim under the DTPA. First, a successful plaintiff can recover up to three times the amount of actual damages.[138] A consumer need only prove the conduct was committed "knowingly."[139] This rather ambiguous term requires the injured party to prove that the actor had "actual awareness of the falsity, deception, or unfairness of the act or practice,"[140] but may be inferred from objective evidence.[141] Proof of willful conduct is not required.[142] The consumer does not have to introduce evidence of the defendant's state of mind; this element may be proven by showing that a reasonable person would have "actually" known of the effects of their conduct.[143]

Injured plaintiffs may also recover attorneys' fees.[144] While this element of damages is typically not available to personal injury claimants,[145] it is allowed under statutory causes of action.[146] Of course, the consumer bears the burden to show that the attorneys' fees were

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134. TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987 & Supp. 1990).

135. *Id.*

136. Jim Walter Homes, Inc. v. Valencia, 679 S.W.2d 29, 36 (Tex. App.—Corpus Christi 1984), *aff'd*, 690 S.W.2d 239 (Tex. 1985).

137. Blumenthal v. Ameritex Computer Corp., 646 S.W.2d 283, 286 (Tex. App.—Dallas 1983, no writ); Jim Walter Homes, Inc. v. Geffert, 614 S.W.2d 843, 845 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e).

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

139. *Id.*

140. *Id.* § 17.45(9).

141. *Id.*

142. North Star Dodge Sales, Inc. v. Luna, 653 S.W.2d 892, 897 (Tex. App.—San Antonio 1983), *aff'd in part, rev'd on other grounds*, 667 S.W.2d 115 (Tex.1984).

143. Jim Walter Homes, Inc. v. Gonzales, 686 S.W.2d 715, 718 (Tex. App.—San Antonio 1985, writ dism'd).

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

145. New Amsterdam Casualty Co. v. Texas Indus., Inc., 414 S.W.2d 914, 915 (Tex.

both reasonable and necessary in light of the work performed.[147] Special care, however, should be taken in contingent fee arrangements.[148]

A difficult situation could arise where DTPA based causes of action are combined with causes of action which do not allow recovery of attorneys' fees. In those cases, some courts require consumers to segregate the amount of work done on the causes of action where attorneys' fees are recoverable from work performed on causes of action where they are not recoverable.[149] The better reasoned view, however, does not require segregation of attorneys' fees when the causes of action arise out of the same transaction or are intertwined with one another.[150]

C. *Tort Reform*

The provisions of the Texas Legislature's 1987 "tort reform" do not apply to lawsuits predicated on the DTPA if those suits arise from deceptive acts or practices committed prior to September 1, 1989.[151] The tort reform package exempted suits under the DTPA.[152] Thus, as previously discussed, the version of the DTPA in effect at the time that the deceptive acts or practices occurred will determine the version of the Act governing the lawsuit.[153] Since the 1989 amendments

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1967); Commonwealth Lloyds Ins. Co. v. Thomas, 678 S.W.2d 278, 285 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

146. International Armanent Corp. v. King, 686 S.W.2d 595, 599 (Tex. 1985); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 706 (Tex. 1983).

147. Chrysler Corp. v. Schuenemann, 618 S.W.2d 799, 807-08 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); Bavarian Autohaus, Inc. v. Holland, 570 S.W.2d 110, 116 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

148. Fairmount Homes, Inc. v. Upchurch, 704 S.W.2d 521, 526 (Tex. App.—Houston [14th Dist.]), *aff'd on other grounds*, 711 S.W.2d 618 (Tex. 1986); King v. Ladd, 624 S.W.2d 195, 198 (Tex. App.—El Paso 1981, no writ). For an example of recovery of attorneys' fees under a contingent fee contract, see March v. Thiery, 729 S.W.2d 889, 897 (Tex. App.—Corpus Christi 1987, no writ).

149. Crow v. Central Soya Co., 651 S.W.2d 392, 396 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.); Bray v. Curtis, 544 S.W.2d 816, 820 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

150. Village Mobile Homes, Inc. v. Porter, 716 S.W.2d 543, 552 (Tex. App.—Austin 1986, writ ref'd n.r.e.); De La Fuente v. Home Savings Ass'n, 669 S.W.2d 137, 146 (Tex. App.—Corpus Christi 1984, no writ).

151. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.017, 41.001-.009 (Vernon Supp. 1990)(tort reform legislation).

152. *Id.* §§ 33.002(2), 41.002(b)(1).

153. *See supra* notes 2-8 and accompanying text.

to the DTPA become effective on September 1, 1989,[154] all suits predicated on acts or practices occurring before that date are subject to the 1987 version of the DTPA.

Two significant areas in the tort reform package will affect the DTPA. First, under Chapter 41.003 of the Civil Practice and Remedies Code, a consumer's right to punitive damages will be limited to an amount "not [to] exceed four times the amount of actual damages or $200,000, which ever is greater."[155] Second, common law defenses will become available in a personal injury suit under the DTPA.

This drastic limitation on punitive damages may significantly restrict a claimant's rights to obtain exemplary damages against grossly negligent defendants. Moreover, the consumer will now need to meet a stricter standard of proof in order to obtain punitive damages in DTPA-based documents. Under the pre-tort reform standard, punitive damages were allowed whenever the jury found that a defendant's conduct evidenced such an entire lack of care as to indicate that the act was a result of conscious indifference to the rights, welfare, or safety of persons affected by it.[156] Prior to September 1, 1987, *Williams v. Steves Industries, Inc.*,[157] and *Burk Royalty Co. v. Walls*,[158] allowed objective proof of gross negligence.

Tort reform now defines gross negligence as "[m]ore than momentary thoughtlessness, inadvertence, or error of judgment. It means 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."[159] The new statute requires additional evidence of gross negligence but does not specify what new proof is required. The old "some care" standard[160] was not codified in the new law. Previous commentators have indicated that direct evidence

154. Act of May 29, 1989, ch. 380, § 3, 1989 Tex. Sess. Law Serv. 6 (Vernon). The statute applies to all actions or claims "commenced" on or before the September 1, 1989 effective date. Pre-suit notice which is given pursuant to section 17.505 of the Texas Business and Commerce Code is considered "commencing" the lawsuit for purposes of determining the applicability of the amendments so long as suit was brought within 120 days of the letter. *Id.*

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

156. *Id.*

157. 699 S.W.2d 570, 573 (Tex. 1985).

158. 616 S.W.2d 911, 922 (Tex. 1981).

159. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 1990).

160. Armco Steel Corp. v. Jones, 376 S.W.2d 825, 828-29 (Tex. 1964).

of the defendant's subjective state of mind is not required.[161] Thus, so long as the defendant's actual state of mind can be inferred by the trier of fact, objective evidence is still appropriate.

The second significant area which tort reform brings to DTPA practice is the availability of common law defenses. Under the new Comparative Responsibility Act,[162] a plaintiff's contributory negligence may be submitted to the jury to be considered when determining the percentage of responsibility.[163] Prior to September 1, 1989, common law defenses were not available to defeat a DTPA claimant's lawsuit. Application of the new Comparative Responsibility Act to DTPA lawsuits will bring a potent weapon to the defendant's arsenal.[164]

D. *UCC Warranty Theories*

The Uniform Commercial Code provides an alternative remedy to strict liability in tort with respect to injuries suffered from a defective product.[165] Breaches of the UCC warranties constitute prohibited conduct within the DTPA.[166] A perfect example of this is *Garcia v. Texas Instruments Inc.*, wherein an action for personal injuries arose from an alleged breach of the implied warranty of merchantability.[167]

Major disadvantages of bringing an action under the UCC rather than as a product liability claim are that the statute of limitations runs from the date of sale.[168] Additionally, the UCC does not provide a "discovery rule" provision for avoiding the bar.[169] Further, the failure to comply with the notice requirements of the UCC may be used as a defense to the injured consumer's lawsuit.[170]

The personal injury claimant's burden of proof under a

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161. Montford and Barber, *1987 Texas Tort Reform: The Quest For A Fair And More Predictable Texas Civil Justice System - Part 2,* 25 HOUS. L. REV. 245, 319 (1988).

162. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012 (Vernon Supp. 1990).

163. *Id.*

164. *See supra* footnotes 151-63 and accompanying text.

165. TEX. BUS. & COM. CODE ANN. §§ 2.314 -.315 (Tex. UCC)(Vernon 1968).

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

167. 610 S.W.2d 456, 457 (Tex. 1980).

168. TEX. BUS. & COM. CODE ANN. § 2.725 (Tex. UCC)(Vernon 1968).

169. Fitzgerald v. Caterpillar Tractor Co., 683 S.W.2d 162, 165 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

170. TEX. BUS. & COM. CODE ANN. § 2.607(c)(1) (Vernon 1968); *see also* McLain v. Hodge, 474 S.W.2d 772, 776 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.)(defendent argued that he had not gotten timely notice).

DTPA/UCC warranty case is somewhat murky. In *Fitzgerald v. Caterpillar Tractor Co.*,[171] summary judgment was upheld against a plaintiff who claimed to have suffered substantial personal injuries from a defective forklift blade assembly.[172] The plaintiff sued solely on a breach of the implied warranty of fitness.[173] The court held that a plaintiff must prove that on the date of manufacture the product in question was not merchantable or fit for its purpose.[174]

The Texas Supreme Court made the burden of proof even more onerous in *Plas-Tex, Inc. v. U.S. Steel Corp.*[175] In that case, Plas-Tex asserted a claim against U.S. Steel for indemnity resulting from breach of the implied warranty of merchantability and the DTPA resulting from the use of defective polyester resins used to manufacture swimming pools.[176] The supreme court held that a plaintiff seeking to prove a product failed to comply with an implied warranty of merchantability must show, at least circumstantially, that the product failed because of something the seller did to it before placing the item in the stream of commerce.[177] The product must be defective meaning "a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy."[178] This definition, when used in an implied warranty of merchantability case is different than when used in a strict liability case.[179]

Prior to *Plas-Tex*, at least one appellate court held that it was not necessary for a personal injury plaintiff asserting a breach of implied warranty to show that the product was defective.[180] The *Plas-Tex* decision expressly disapproved this prior formulation[181] and stated that the new test applies whether personal injuries or economic losses

171. 683 S.W.2d 162 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

172. *Id.* at 163.

173. *Id.*

174. *Id.* (citation omitted); Clark v. De Laval Separator Corp., 639 F.2d 1320, 1326 (5th Cir. 1981); TEX. BUS. & COM. CODE ANN. § 2.314 (Vernon 1968).

175. 772 S.W.2d 442, 443 (Tex. 1989).

176. *Id.*

177. *Id.* at 443-45.

178. *Id.* at 444 n.4.

179. Bernard v. Dresser Indus., Inc., 691 S.W.2d 734, 738 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

180. Plas-Tex, Inc. v. U. S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989).

181. *Id.* n.6.

are involved.[182]

A plaintiff asserting a breach of implied warranty of merchantability does not have to use direct or expert opinion testimony to show that the goods had a defect. Under *Plas-Tex*, the breach of the implied warranty can be proven by circumstantial evidence showing that the goods were used properly.[183] However, since the implied warranties only apply when the product is properly used, the defendant can show misuse or contributory negligence to rebut the argument that the product is not fit for it's intended purpose.[184]

V. CONCLUSION

The DPTA is a fertile and dynamic area for consideration when bringing a claim for personal injury damages. The DTPA requires a careful analysis in order to properly apply it, because the Act has been amended numerous times. The applicable statute of limitations and scope of permissible recovery are generally governed by the Act that was in effect at the time of the alleged violation. The same is true for the classification of acts considered to be deceptive and the entities that can be sued for such conduct.

The Act is more expansive than the U.C.C. because it pertains to both goods and services. So long as the parties claiming injuries from the deceptive acts can demonstrate "consumer" status, the Act has been liberally interpreted and applied. In this regard, the benefits of the Act have been extended to individuals who were not the actual purchasers of items, as well as to bystanders.

Personal injury damages, including damages for wrongful death, are recoverable under the DTPA. These damages may be trebled if deceptive acts were committed "knowingly." However, it is now fairly clear that an individual will not be allowed to recover treble damages under the DTPA and punitive damages arising from the same acts or practices. Survival of claims for DTPA damages remains an open question. The defenses to a personal injury claim under the Act prior to 1989 were limited to a few statutory defenses, and uncodified common law defenses were not available.

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182. *Id.* at 444. Proof of misuse of the goods is not necessary if the plaintiff relies instead upon direct evidence. *Id.* n.5.

183. *Id.*; *see also* Proctor & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773, 780 (Tex. Civ. App.—Dallas 1967, writ dism'd)(product must be used according to directions.)

184. *Langley*, 422 S.W.2d at 780.

The 1987 Tort Reform Act does not specifically apply to the DTPA, although practice under the DTPA has been influenced by these reforms. There continue to be ongoing efforts to conform practice under the DTPA to the reform measures that have recently been imposed on other areas of personal injury litigation. This is most apparent with regard to comparing responsibility and permitting the defendant to assert other common law defenses, which are now available for claims commenced after September 1, 1989. The statute has shown itself to be quite a battle ground for litigants and the legislature, and will no doubt continue to challenge those involved in personal injury litigation.