

letter; 5) if further discovery or information is needed to adequately evaluate claim, consider pros and cons of communicating such to Plaintiff's counsel; 6) communicate with insured regarding the demand review process and get the insured's input on value of claim and preference regarding acceptance of Plaintiff's demand; 7) carefully evaluate demand and consider possible responses through written evaluation of the claims or using a worksheet such as that provided in this article; 8) timely respond to Plaintiff's counsel with a formal courteous response to the settlement demand; 9) document in the claim file all efforts undertaken to evaluate and consider *Stowers* demand. For plaintiffs seeking to invoke the *Stowers* duty on an insurer the following should be done: 1) through written discovery identify policy limits applicable to case and all reservations of rights correspondences sent to the insured; 2) prepare thoughtful and unambiguous written demand for a stated sum within policy limits or for "policy limits" that involves at least one covered claim and which a reasonable insurer should accept ; 3) offer full and complete release of all claims against insured; 4) do not make the offer conditional; 5) in personal injury actions, account for and include settlement of all hospital liens in demand, if applicable; and 6) provide Defendant reasonable time to consider and respond to the demand of not less than 14 days.

15 THE TEXAS DECEPTIVE TRADE PRACTICES ACT

- A. **Introduction.** Among the areas where businesses are increasingly vulnerable to litigation is in the area of consumer protection statutes. One such statute is the Texas Deceptive Trade Practices and Consumer Protection Act, more commonly known as the "DTPA". The DTPA was originally enacted to: 1) provide consumers with a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in common-law fraud or breach of warranty suits;⁴⁵³ 2) encourage consumers to litigate claims that would not otherwise be economically feasible by permitting a successful plaintiff to recover attorneys fees,⁴⁵⁴ and 3) to deter false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty in trade or commerce. Unfortunately, this consumer oriented law can be used as a powerful weapon by consumers against honest businesses when there is any minute basis to claim misrepresentation or deception. The Act authorizes actions by the Consumer Protection Division of the Texas Attorney General's office, and also provides a private civil remedy to consumers for deceptive trade practices that are a producing cause of economic and mental anguish

⁴⁵³ *State Farm Fire and Cas. Co. v. Price*, 845 S.W.2d 427, (Tex. App.– Amarillo 1992, writ dismissed by agr.); see also *Sergeant Oil & Gas Co., Inc. v. National Maintenance & Repair, Inc.*, 861 F.Supp. 1351 (S.D. Tex.1994).

⁴⁵⁴ *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex.1980); see also *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex.1980).

damages to the consumer.⁴⁵⁵ The DTPA applies to **trade and commerce** which is defined in the Act as advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of Texas.⁴⁵⁶ This expansive definition promotes wide applicability of the DTPA against businesses. In order to avoid DTPA liability, it is essential to have a basic understanding of the DTPA, the conduct that can lead to liability, and steps that can be taken to minimize the risk of being sued. This section explores the basic concepts of the DTPA and provides recommendations on handling consumer complaints.

- B. Intent to Deceive is irrelevant to DTPA liability.** Defendants are often surprised to learn that even though they did not intend to make a misrepresentation to the consumer, such good intent is not a defense to a DTPA action. Unlike a common law fraud claim, which requires the plaintiff to prove that the speaker knew the representation was false or made it recklessly without any knowledge of the truth,⁴⁵⁷ there is no requirement under most provisions of the DTPA to prove the Defendant intended to misrepresent or had knowledge that the representation was false.⁴⁵⁸ For example, Texas courts have determined that when a seller makes affirmative representations in the context of a sales transaction, the law imposes a duty to know whether that statement is true, and liability may attach when untrue representations are made whether or not they were known to be untrue.⁴⁵⁹ All a DTPA plaintiff is required to prove to win a DTPA case is: 1) the plaintiff was a consumer; 2) the defendant engaged in conduct prohibited by the Act; and 3) the prohibited conduct was a producing cause of the consumer's damages.⁴⁶⁰ Producing cause is an act that is a substantial factor that brings about injury and without which the injury would not have occurred.⁴⁶¹
- C. Who is a Consumer?** There are two basic requirements for an individual or business to qualify as a consumer under the DTPA: 1) the consumer must have sought or acquired, by purchase or lease, goods or services; and 2) the acquired goods or services must form the basis of the complaint.⁴⁶² The DTPA, however, does not apply to business consumers that have assets of \$25 million or more, or that are owned or controlled by a corporation or entity with assets of \$25 million or more.⁴⁶³ An individual "seeks" goods or services

⁴⁵⁵ TEX. BUS. & COM. CODE ANN. § 17.50.

⁴⁵⁶ TEX. BUS. & COM. CODE ANN. § 17.45(6).

⁴⁵⁷ *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.* 962 S.W.2d 507, 524 (Tex. 1997).

⁴⁵⁸ *Smith v. Herco, Inc.*, 900 S.W.2d 852, 859 (Tex. App.—Corpus Christi 1995, writ denied).

⁴⁵⁹ *Id.*

⁴⁶⁰ *Doe v. Boys Clubs of Greater Dallas*, 907 S.W.2d 472, 478 (Tex. 1995); *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1).

⁴⁶¹ *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489, 491 (Tex. 1998).

⁴⁶² *Insurance Co. of North America v. Morris*, 981 S.W.2d 667, 676 (Tex. 1998).

⁴⁶³ TEX. BUS. & COM. CODE ANN. § 17.45(4).

when he or she requests or asks for them.⁴⁶⁴ One "acquires" goods or services when one gets or comes to have the goods or services as one's own.⁴⁶⁵ And the DTPA, does not require a plaintiff to be a direct purchaser of the good or service, as long as the plaintiff is the beneficiary of those goods or services.⁴⁶⁶ Consumer status can also be established merely by seeking to acquire goods or services, even if they are not actually acquired.⁴⁶⁷ It is unnecessary for money to change hands to establish consumer status.⁴⁶⁸ It is also unnecessary for there to have been a written agreement or an actual purchase; it is sufficient for the plaintiff to seek to acquire goods or services in good faith.⁴⁶⁹ DTPA claims are generally not assignable by an aggrieved consumer to someone else.⁴⁷⁰

- D. **Who is a Proper DTPA Defendant?** The DTPA provides that a consumer may bring suit against *any person* whose false, misleading, or deceptive acts or other practices identified in the Act are a producing cause of the consumer's harm.⁴⁷¹ Person is defined in the statute as an individual, partnership, corporation, association, or other group however recognized.⁴⁷² An employee, who personally participated in a transaction can be held personally liable for violations of the Act, even if he had no intent to deceive anyone and did not know his representations were false.⁴⁷³
- E. **Prohibited Trade Practices actionable under the DTPA.** There are four primary categories of prohibited trade practices under the DTPA, which are: 1) breach of express or implied warranties;⁴⁷⁴ 2) violations of Chapter 541 of the Texas Insurance Code;⁴⁷⁵ 3) an unconscionable action or course of action;⁴⁷⁶ and 4) conduct by the Defendant relied on to the consumer's detriment⁴⁷⁷ which are specifically identified in the DTPA statute as false, misleading or deceptive (the "laundry list").⁴⁷⁸ While DTPA does not create any warranty, the breach of both express and implied warranties, created by the common law or other statutes, are actionable under the DTPA.⁴⁷⁹ Chapter 541 of the Texas Insurance Code prohibits specific unfair practices

⁴⁶⁴ *Westinghouse Supply Co. v. Page & Wirtz Constr. Co.*, 647 S.W.2d 44, 47 (Tex. App.--Amarillo 1982, writ ref'd n.r.e.).

⁴⁶⁵ *Hernandez v. Kasco Ventures, Inc.*, 832 S.W.2d 629, 634 (Tex.App.--El Paso 1992, no writ).

⁴⁶⁶ *Kennedy v. Sale*, 689 S.W.2d 890, 892-893 (Tex.1985).

⁴⁶⁷ *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.--San Antonio 2002, no pet.).

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *PPG Indus.v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 91 (Tex., 2004).

⁴⁷¹ TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(emphasis added).

⁴⁷² TEX. BUS. & COM. CODE ANN. § 17.45(3).

⁴⁷³ *Miller v. Keyser*, 90 S.W.3d 712, 716 (Tex. 2002).

⁴⁷⁴ TEX. BUS. & COM. CODE ANN. § 17.50(a)(2).

⁴⁷⁵ TEX. BUS. & COM. CODE ANN. § 17.50(a)(4).

⁴⁷⁶ TEX. BUS. & COM. CODE ANN. § 17.50(a)(3).

⁴⁷⁷ TEX. BUS. & COM. CODE ANN. § 17.50(a)(1).

⁴⁷⁸ TEX. BUS. & COM. CODE ANN. § 17.46(b), (d).

⁴⁷⁹ *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex.1984).

by insurance companies,⁴⁸⁰ and is discussed extensively in Chapters 7 and 11 of this Guide. An “unconscionable action or course of action” is an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.⁴⁸¹ Taking advantage of a consumer to a grossly unfair degree requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.⁴⁸² Whether an act is unconscionable is determined by an objective standard, and whether the defendant knew or should have known the act was unconscionable is irrelevant to the determination of DTPA liability.⁴⁸³

F. **The Laundry List of Prohibited Conduct.** The Act also prohibits conduct specifically identified as **false, misleading, or deceptive acts or practices**⁴⁸⁴ as follows:

- 1) passing off goods or services as those of another;
- 2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- 3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by another;
- 4) using deceptive representations or designations of geographic origin in connection with goods or services;
- 5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
- 6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;
- 7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- 8) disparaging the goods, services, or business of another by false or misleading representation of facts;
- 9) advertising goods or services with intent not to sell them as advertised;
- 10) advertising goods or services with intent not to supply a reasonable expect able public demand, unless the advertisements disclosed a limitation of quantity;
- 11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;
- 12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are

⁴⁸⁰ TEX. INS. CODE § 541.000 et seq.

⁴⁸¹ TEX. BUS. & COM. CODE ANN. § 17.45(5).

⁴⁸² *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex.1985).

⁴⁸³ *Id.* at 583.

⁴⁸⁴ TEX. BUS. & COM. CODE ANN. § 17.46.

- prohibited by law;
- 13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;
- 14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;
- 15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;
- 16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;
- 17) advertising of any sale by fraudulently representing that a person is going out of business;
- 18) advertising, selling, or distributing a card which purports to be a prescription drug identification card issued under Section 4151.152, Insurance Code, in accordance with rules adopted by the commissioner of insurance, which offers a discount on the purchase of health care goods or services from a third party provider, and which is not evidence of insurance coverage, unless:
 - a. the discount is authorized under an agreement between the seller of the card and the provider of those goods and services or the discount or card is offered to members of the seller;
 - b. the seller does not represent that the card provides insurance coverage of any kind; and
 - c. the discount is not false, misleading, or deceptive;
- 19) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;
- 20) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and Sections 2A.212 through 2A.216 to involve obligations in excess of those which are appropriate to the goods;
- 21) promoting a pyramid promotional scheme, as defined by Section 17.461;
- 22) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or

- the parts replaced;
- 23) filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract;
 - 24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
 - 25) Using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction;
 - 26) selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon's Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act or is not registered with the Teacher Retirement System of Texas as required by Section 8A of that Act; or
 - 27) taking advantage of a disaster declared by the governor under Chapter 418, Government Code, by:
 - a. selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or
 - b. demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

G. **Compared to Breach of Contract Claims.** A mere breach of contract without more does not constitute a false, misleading or deceptive act in violation of the DTPA.⁴⁸⁵ There has to be more than just a breach of the agreement. For example, a contractual promise made with no intention of performing it may give rise to an action for fraudulent inducement which is actionable. Procuring a contract through fraud or misrepresentation is actionable under the DTPA.⁴⁸⁶

⁴⁸⁵ *Tony Gullo Motors I, L.P. v. Nury Chapa*, 212 S.W.3d 299, 304 (Tex. 2005).

⁴⁸⁶ *Id.* at 306.

H. **Damages.** When successful in establishing DTPA liability, a plaintiff may recover economic damages,⁴⁸⁷ defined as compensatory damages for pecuniary loss, including costs of repair and replacement.⁴⁸⁸ Economic damages do not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.⁴⁸⁹ A consumer can submit to the fact finder alternative measures of damages and recover the greatest.⁴⁹⁰ For example, traditional measures of damages in a misrepresentation case can either be “out of pocket expenses” or “loss of benefit of the bargain.”⁴⁹¹ The out of pocket measure computes the difference between the value paid and the value received, while the benefit of the bargain measure computes the difference between the value as represented and the value received.⁴⁹² However, recoverable damages are not limited to out of pocket or benefit of bargain measures, rather, other damages are recoverable to ensure that the plaintiff is made whole.⁴⁹³ Other damages which may be recovered, depending on the case, include reasonably necessary expenses related to defendant's conduct;⁴⁹⁴ lost profits;⁴⁹⁵ damage to credit;⁴⁹⁶ and consequential damages.⁴⁹⁷ The successful plaintiff also recovers court costs and reasonable and necessary attorneys' fees;⁴⁹⁸ and other relief which the court deems proper in the particular case.

- 1) If the Defendant's conduct was found to be committed **knowingly**, the consumer may also recover, in addition to other damages, mental anguish, and up to three times the amount of economic damages.⁴⁹⁹ Knowingly means the Defendant acted with actual awareness of the falsity, deception, or unfairness of the act or practice which is the subject of the consumer's complaint, and may be inferred where there are objective manifestations that the Defendant acted with actual awareness.⁵⁰⁰ Actual awareness does not mean merely that a person knows what he is doing; rather, it means that a person knows that what he is doing is false, deceptive, or unfair.⁵⁰¹ Even if no economic damages are proved, mental anguish damages may still be

⁴⁸⁷ TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

⁴⁸⁸ TEX. BUS. & COM. CODE ANN. § 17.45(11).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985).

⁴⁹¹ *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127 (Tex. 1988).

⁴⁹² *Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1997); *see also Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d at 817 (Tex. 1997).

⁴⁹³ *Kish*, 692 S.W.2d at 466-68.

⁴⁹⁴ *Id.*

⁴⁹⁵ *White v. Southwestern Bell Telephone Co.*, 651 S.W.2d 260 (Tex.1983).

⁴⁹⁶ *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex.1981).

⁴⁹⁷ *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 163 (Tex. 1992)(Phillips, J. Concurring).

⁴⁹⁸ TEX. BUS. & COM. CODE ANN. § 17.50(d).

⁴⁹⁹ TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

⁵⁰⁰ TEX. BUS. & COM. CODE ANN. § 17.45(9).

⁵⁰¹ *St. Paul Surplus Lines Ins. Co., Inc. v. Dal-Worth Tank Co., Inc.*, 974 S.W.2d 51, 54 (Tex. 1998).

recoverable when the defendant acts knowingly.⁵⁰² To recover mental anguish damages, a plaintiff must present direct evidence of the nature, duration, and severity of the mental anguish establishing a *substantial disruption in the plaintiff's daily routine*.⁵⁰³ There must be evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger.⁵⁰⁴

- 2) If the Defendant's conduct was committed **intentionally**, the consumer may recover, in addition to the other damages, mental anguish as found by the trier of fact, and up to three times the amount of damages for mental anguish *and* economic damages.⁵⁰⁵ Intentionally means the Defendant acted with actual awareness of the falsity, deception, or unfairness of the act or practice and intended the consumer to rely on that act or practice, and may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices such that the defendant should be treated as having acted intentionally.⁵⁰⁶
- 3) The Plaintiff's failure to mitigate his damages can be used as a defense in DTPA actions.⁵⁰⁷
- 4) Tie-in Statute Exceptions. The limitation on the recovery of economic damages under the DTPA is not applicable if the another law permits a cause of action to be brought under the DTPA.⁵⁰⁸ In such a case, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally.⁵⁰⁹

- I. **Claims Excluded from the DTPA.** With certain exceptions, the DTPA does not apply to: 1) advertisements in a regularly published newspaper, magazine, telephone directory, broadcast station, or billboard unless the publisher has knowledge of the false, deceptive, or misleading practice or has a financial interest in the publication;⁵¹⁰ 2) acts or practices authorized by rules or regulations of the Federal Trade Commission;⁵¹¹ 3) causes of action for bodily injury or death or for the infliction of mental anguish;⁵¹² 4) claims

⁵⁰² *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex. 1998).

⁵⁰³ *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex.1995).

⁵⁰⁴ *Id.*

⁵⁰⁵ TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

⁵⁰⁶ TEX. BUS. & COM. CODE ANN. § 17.45(13).

⁵⁰⁷ *Carrizales v. State Farm Lloyds*, 518 F.3d 343, 350 (5th Cir 2008).

⁵⁰⁸ TEX. BUS. & COM. CODE ANN. § 17.50(h).

⁵⁰⁹ *Id.*

⁵¹⁰ TEX. BUS. & COM. CODE ANN. § 17.49(a).

⁵¹¹ TEX. BUS. & COM. CODE ANN. § 17.49(b).

⁵¹² TEX. BUS. & COM. CODE ANN. § 17.49(e).

against persons or their employers⁵¹³ for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill;⁵¹⁴ 5) claims arising out of a written contract if the total consideration was more than \$100,000, the consumer was represented by legal counsel of their choosing, and does not involve the consumer's residence;⁵¹⁵ and 6) causes of action arising from a transaction(s), or project, involving total consideration by the consumer of more than \$500,000, other than a cause of action involving a consumer's residence.

J. **OTHER ISSUES**

- 1) Indemnity. A Defendant may seek contribution or indemnity from one who, under the statute law or at common law, may have liability for the damaging event of which the consumer complains. The Defendant may be entitled to recover all sums that he is required to pay as a result of the action, his attorney's fees reasonable in relation to the amount of work performed in maintaining his action for indemnity, and his costs.⁵¹⁶

- 2) Waiver. Any waiver of any rights under the DTPA is generally prohibited and void as contrary to public policy, but can be enforced if the waiver strictly complies with specific statutory requirements.⁵¹⁷ A waiver will be enforced if: (1) the waiver is in writing and signed by the consumer; (2) the consumer is not in a significantly disparate bargaining position; and (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.⁵¹⁸ A waiver is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.⁵¹⁹ The waiver is also required to be: (1) conspicuous and in bold-face type of at least 10 points in size; (2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and (3) in substantially the following form:

"I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."

⁵¹³ TEX. BUS. & COM. CODE ANN. § 17.49(d).

⁵¹⁴ TEX. BUS. & COM. CODE ANN. § 17.49c.

⁵¹⁵ TEX. BUS. & COM. CODE ANN. § 17.49(f).

⁵¹⁶ TEX. BUS. & COM. CODE ANN. § 17.555.

⁵¹⁷ TEX. BUS. & COM. CODE ANN. § 17.42(a).

⁵¹⁸ *Id.*

⁵¹⁹ *Id.* at § 17.42(b).

- 3) **Limitations.** All actions brought under the DTPA must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.⁵²⁰ The limitations period may be extended for a period of 180 days if the plaintiff proves that failure to timely commence the lawsuit was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.⁵²¹

16 PROCEDURAL ISSUES FOR DTPA AND INSURANCE CODE CLAIMS

- A. Notice Requirements.** Many times a consumer will attempt to resolve the complaint informally with the Defendant before hiring an attorney. This is usually the best opportunity for a potential Defendant to resolve the complaint with the consumer. Assuming those discussions breakdown, a consumer is required to give 60 days written notice to the Defendant advising in reasonable detail of the consumer's specific complaint, the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.⁵²² If an appropriate demand/notice is not sent timely, the case may be abated until 60 days after the date the proper notice is provided.⁵²³ Once a demand letter is received, the Defendant should seek advise of legal counsel for response. Depending on the response made, a Defendant may be entitled to special defenses provided for in the DTPA and Texas Insurance Code, and can effectively take away the claimant counsel's incentive to pursue the claim further. In a DTPA case, during the 60-day period a Defendant can make 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.⁵²⁴
- B. Offers of Settlement.** Both the DTPA and the Insurance Code encourage Defendants to make offers of settlement after receiving a demand letter, by giving the Defendant a special defense based on the settlement offer. Usually Defendants can tender a settlement offer at any time within sixty days after the notice is received.⁵²⁵ An offer of settlement by a defendant must include an offer to pay, separately stated: 1) an amount of money or other consideration, reduced to its cash value, as settlement of the consumer's claim for damages; and 2) an amount of money to compensate the consumer for the consumer's reasonable and necessary attorneys' fees

⁵²⁰ *Id.* at § 17.565.

⁵²¹ *Id.*

⁵²² TEX. BUS. & COM. CODE ANN. § 17.505(a); TEX INS. CODE §541.154.

⁵²³ TEX. BUS. & COM. CODE ANN. § 17.505©; TEX INS. CODE §541.155.

⁵²⁴ *Id.*

⁵²⁵ *Id.* §17.5052(a); TEX INS. CODE §541.156(a).