

14 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 The DTPA was originally enacted to: 1) provide consumers with a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in common-law fraud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;³⁴⁰ 2) encourage consumers to litigate claims that would not otherwise be economically feasible by permitting a successful plaintiff to recover attorneys fees;³⁴¹ 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 is now often used as a powerful weapon by consumers against honest businesses where 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 damages to the consumer.³⁴² 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.³⁴³ 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,³⁴⁴ 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.³⁴⁵ For example, Texas courts have determined that when a seller makes affirmative

³⁴⁰ See *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).

³⁴¹ See *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex.1980); see also *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex.1980).

³⁴² See TEX. BUS. & COM. CODE ANN. § 17.50.

³⁴³ See TEX. BUS. & COM. CODE ANN. § 17.45(6).

³⁴⁴ See *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.* 962 S.W.2d 507, 524 (Tex. 1997).

³⁴⁵ See *Smith v. Herco, Inc.*, 900 S.W.2d 852, 859 (Tex. App.–Corpus Christi 1995, writ denied).

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.³⁴⁶ 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.³⁴⁷ Producing cause is an act that is a substantial factor that brings about injury and without which the injury would not have occurred.³⁴⁸

- 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.³⁴⁹ 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.³⁵⁰ An individual "seeks" goods or services when he or she requests or asks for them.³⁵¹ One "acquires" goods or services when one gets or comes to have the goods or services as one's own.³⁵² 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.³⁵³ DTPA claims are generally not assignable by an aggrieved consumer to someone else.³⁵⁴
- 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.³⁵⁵ person is defined in the statute as an individual, partnership, corporation, association, or other group however recognized.³⁵⁶ 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.³⁵⁷
- E. **Prohibited Trade Practices actionable under the DTPA.** There are four general categories of prohibited trade practices under the DTPA, which are: 1) breach of express or implied warranties;³⁵⁸ 2) violations of article 21.21 of the Texas Insurance

³⁴⁶ See *id.*

³⁴⁷ See *Doe*, at 478; see also TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon Supp.1998).

³⁴⁸ See *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489, 491 (Tex. 1998).

³⁴⁹ See *Insurance Co. of North America v. Morris*, 981 S.W.2d 667, 676 (Tex. 1998).

³⁵⁰ See TEX. BUS. & COM. CODE ANN. § 17.45(4).

³⁵¹ See *Westinghouse Supply Co. v. Page & Wirtz Constr. Co.*, 647 S.W.2d 44, 47 (Tex. App.--Amarillo 1982, writ ref'd n.r.e.).

³⁵² See *Hernandez v. Kasco Ventures, Inc.*, 832 S.W.2d 629, 634 (Tex.App.--El Paso 1992, no writ).

³⁵³ See *Kennedy v. Sale*, 689 S.W.2d 890, 892-893 (Tex.1985).

³⁵⁴ See *PPG Indus.v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 91 (Tex., 2004).

³⁵⁵ See TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(emphasis added).

³⁵⁶ See TEX. BUS. & COM. CODE ANN. § 17.45(3).

³⁵⁷ See *Miller v. Keyser*, 90 S.W.3d 712, 716 (Tex. 2002).

³⁵⁸ See TEX. BUS. & COM. CODE ANN. § 17.50(a)(2).

Code;³⁵⁹ 3) an unconscionable action or course of action;³⁶⁰ and 4) conduct by the Defendant relied on to the consumer's detriment³⁶¹ which are specifically defined as false, misleading or deceptive under the DTPA.³⁶² 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.³⁶³ Article 21.21 of the Texas Insurance Code prohibits specific unfair practices by insurance companies.³⁶⁴ 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.³⁶⁵ Taking advantage of a consumer to a grossly unfair degree requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.³⁶⁶ Whether an act is unconscionable is determined by an objective standard, and whether the defendant knew or should have know the act was unconscionable is irrelevant to the determination of DTPA liability.³⁶⁷

F. **The Laundry List of Prohibited Conduct.** The Act also prohibits conduct specifically identified as **false, misleading, or deceptive acts or practices**. Of the twenty-six listed actions, the following are the most common claims against businesses:

- 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;

³⁵⁹ See TEX. BUS. & COM. CODE ANN. § 17.50(a)(4).

³⁶⁰ See TEX. BUS. & COM. CODE ANN. § 17.50(a)(3).

³⁶¹ See TEX. BUS. & COM. CODE ANN. § 17.50(a)(1).

³⁶² See TEX. BUS. & COM. CODE ANN. § 17.46(b), (d).

³⁶³ See *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex.1984).

³⁶⁴ See TEX. INS. CODE ANN. § 21.21 (Vernon Supp. 1999).

³⁶⁵ See TEX. BUS. & COM. CODE ANN. § 17.45(5).

³⁶⁶ See *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex.1985).

³⁶⁷ See *id.* at 583.

- 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 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) advertising of any sale by fraudulently representing that a person is going out of business;
- 17) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve;
- 18) 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;
- 19) the failure 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;

G. **Damages.** When successful in establishing DTPA liability, a plaintiff may recover economic damages,³⁶⁸ defined as compensatory damages for pecuniary loss, including costs of repair and replacement.³⁶⁹ 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.³⁷⁰ A consumer can submit to the fact finder alternative measures of damages and recover the greatest.³⁷¹ For example, traditional measures of damages in a misrepresentation case can either be “out of pocket expenses” or “loss of benefit of the bargain.”³⁷² 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.³⁷³ However, recoverable damages are not limited to out of pocket or benefit of bargain measures,

³⁶⁸ See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

³⁶⁹ See TEX. BUS. & COM. CODE ANN. § 17.45(11).

³⁷⁰ See *id.*

³⁷¹ See *Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985).

³⁷² See *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127 (tex. 1988).

³⁷³ See *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).

rather, other damages are recoverable to ensure that the plaintiff is made whole.³⁷⁴ Other damages which may be recovered, depending on the case, include reasonably necessary expenses related to defendant's conduct;³⁷⁵ lost profits;³⁷⁶ damage to credit;³⁷⁷ and consequential damages.³⁷⁸ The successful plaintiff also recovers court costs and reasonable and necessary attorneys' fees,³⁷⁹ 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.³⁸⁰ 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.³⁸¹ 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.³⁸² Even if no economic damages are proved, mental anguish damages may still be recoverable when the defendant acts knowingly.³⁸³ 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*.³⁸⁴ There must be evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger.³⁸⁵
- 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.³⁸⁶ 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.³⁸⁷

³⁷⁴ See Kish, 692 S.W.2d at 466-68.

³⁷⁵ See *id.*

³⁷⁶ See White v. Southwestern Bell Telephone Co., 651 S.W.2d 260 (Tex.1983).

³⁷⁷ See Mead v. Johnson Group, Inc., 615 S.W.2d 685, 687 (Tex.1981)

³⁷⁸ See Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 163 (Tex. 1992)(Phillips, J. Concurring).

³⁷⁹ See TEX. BUS. & COM. CODE ANN. § 17.50(d).

³⁸⁰ See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

³⁸¹ See TEX. BUS. & COM. CODE ANN. § 17.45(9).

³⁸² See St. Paul Surplus Lines Ins. Co., Inc. v. Dal-Worth Tank Co., Inc., 974 S.W.2d 51, 54 (Tex. 1998).

³⁸³ See Latham v. Castillo, 972 S.W.2d 66, 69 (Tex. 1998).

³⁸⁴ See Parkway Co. v. Woodruff, 901 S.W.2d 434, 444 (Tex.1995).

³⁸⁵ See *id.*

³⁸⁶ See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

³⁸⁷ See TEX. BUS. & COM. CODE ANN. § 17.45(13).

- H. **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;³⁸⁸ 2) acts or practices authorized by rules or regulations of the Federal Trade Commission;³⁸⁹ 3) causes of action for bodily injury or death or for the infliction of mental anguish;³⁹⁰ 4) claims against persons or their employers³⁹¹ 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;³⁹² 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 involve the consumer's residence;³⁹³ 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.

15 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.³⁹⁴ 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.³⁹⁵ 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.³⁹⁶
- 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

³⁸⁸ See TEX. BUS. & COM. CODE ANN. § 17.49(a).

³⁸⁹ See TEX. BUS. & COM. CODE ANN. § 17.49(b).

³⁹⁰ See TEX. BUS. & COM. CODE ANN. § 17.49(e).

³⁹¹ See TEX. BUS. & COM. CODE ANN. § 17.49(d).

³⁹² See TEX. BUS. & COM. CODE ANN. § 17.49(c).

³⁹³ See TEX. BUS. & COM. CODE ANN. § 17.49(f).

³⁹⁴ See TEX. BUS. & COM. CODE ANN. § 17.505(a); TEX INS. CODE §541.154.

³⁹⁵ See TEX. BUS. & COM. CODE ANN. § 17.505(c); TEX INS. CODE §541.155.

³⁹⁶ See *id.*